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MORGAN  
INTRODUCTION TO  
THE STUDY OF LAW

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SECOND EDITION  
BY  
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ACTING LAW LIBRARIAN LIBRARY OF CONGRESS

NATIONAL TEXTBOOK SERIES



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## FOREWORD

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The wide use of the first edition of this book has made the publication of a second edition seem worthwhile. The text has been thoroughly reconsidered, and extensive revision of some chapters has been made in the light of recent developments in the law of procedure. Mr. Morgan is primarily responsible for the first seven chapters, and Mr. Dwyer for the eighth and ninth. Chapter eight has been expanded and brought up to date. A portion of this material was published in 6 Federal Bar Journal 170 under the title "Brief Guide to Federal Legal Bibliography" by Francis X. Dwyer and others. Chapter nine is the result of years of experience in assisting students and lawyers in making systematic search of pertinent available sources of the law and recording the results in orderly, usable form.

EDMUND M. MORGAN  
FRANCIS X. DWYER

June, 1948



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# THE STUDY OF LAW

## CHAPTER I

### THE COURTS

**What Is Law?** To attempt in an elementary treatise to answer a question upon which jurists and legal scholars cannot agree would be not only presumptuous but futile. Definitions too numerous to recite, much less to discuss, have been framed by writers of greater or less learning, and some of them have been enunciated with all the modesty of omniscience. It has been confidently asserted that the law is made up of the edicts of the legislative agencies of society plus a body of pre-existing principles which its judicial agencies have but to discover and apply. The law has been said to consist of the commands of the sovereign. With greater approach to reality it has been declared to be merely "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."<sup>1</sup> Pollock and Maitland have said that the law "may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of the rules administered by courts of justice."<sup>2</sup> John C. Gray expressed practically the same thought by saying that the law of a state "is composed of the rules, which the courts . . . lay down for the determination of legal rights and duties."<sup>3</sup> No definition, accurate and universally applicable, has yet been made, and the beginning law

<sup>1</sup> Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356.

<sup>2</sup> Pollock and Maitland, *History of English Law*, XXV.

<sup>3</sup> Gray, *Nature and Sources of Law* (2 ed.), 84. Compare Pound, "What Is the Common Law," 4 U. of Chi. L. Rev. 176, 179, 185 (1937):

"Much of recent thinking about law ignores what Maitland calls the toughness of a taught tradition. A system of law is essentially a taught tradition of ideals, method, doctrines, and principles, continuous as long as the course of teaching remains unbroken. The common law is a

student would profit little by trying to discover or frame one. What he needs is a working hypothesis, and for this purpose he will do well to try the definition of Pollock and Maitland or of Gray. The acceptance of this hypothesis necessitates an inquiry into the composition and functions of courts, and this in turn requires a brief consideration of the origin and development of the English judicial system as well as a description of the existing system in the United States.<sup>4</sup>

### ENGLISH COURTS<sup>5</sup>

**Curia Regis.** Just prior to the Norman Conquest England was covered with a network of local assemblies or courts in

system of this sort, a tradition of taught law, continuous in England from the establishment of an organized teaching in the Inns of Court to the decay of that teaching in the Sixteenth and Seventeenth Centuries, and then, as remade in the age of Coke, continuous in the several lands of the English-speaking world from the Seventeenth Century."

"... There are those today who would think of everything which is done officially as law. Such is not the common-law teaching. Not administration as law but the requiring of administration to conform to rule and form and reason is the common-law ideal. We do not think of administration as parallel with law, but as a process under law. From the time when an English court of the Fourteenth Century refused to allow a collector of the fifteenths for the King to distrain the cattle of a subject without a warrant under seal, Englishmen and their descendants and those who have cast their lots with them have insisted that administration was under and part of the legal order and so under the body of authoritative precepts or standards governing all human action. They have insisted that the political order is not outside of the legal order and above it, but rather that it is the political side of the legal order, or the legal order seen from the political side. The antithesis of their doctrine is the proposition recently maintained by jurists of Soviet Russia, that in the socialist state there can be no law but only administrative ordinances and orders."

<sup>4</sup> In recent years administrative tribunals are performing many functions which were formerly the exclusive business of courts. Their decisions are in many respects as authoritative within their sphere as decisions of courts in ordinary litigation. Consequently the rules applied by them might reasonably be included in a definition of law to be used as an hypothesis by a law student.

<sup>5</sup> In preparation of this section the following have been freely consulted: 1 Holdsworth, *History of English Law* (3 ed.); Pollock and Maitland, *History of English Law* (2 ed.); Adams, *Origin of the English Constitution*.

which the administrative and judicial business of the local units was largely done. In these justice was administered for the ordinary citizen. Men of high degree had resort to the King and Witan. In the King and Witan lay also a large residuary power over matters normally within the jurisdiction of the local courts. This system the Norman Kings nominally accepted. The Curia Regis seemed a mere continuation of the Witan, its composition necessarily modified by Norman feudalism. Like the Witan, it was a legislative, administrative and judicial tribunal. Like the Witan it might have functioned as the central organ of a decentralized government. By strong and skilful exercise of the kingly prerogative, which William I and his successors claimed through Edward, the Confessor, it was transformed into an enormously powerful machine of centralized authority. On its judicial side it was the feudal court for tenants-in-chief of the Crown. But it was more; it was the central judicial tribunal of the realm. The reserve power which the Anglo-Saxon King and Witan had possessed over local courts vested in the Norman King and his Curia Regis. Not for long did it lie unused. Of course, the local courts remained the usual tribunal for ordinary cases, but royal delegates might be sent to preside over them when occasion required; by royal writ causes might be evoked from them. And royal interference was frequent enough to dispel any notion that it was to be regarded as a merely theoretical possibility. Indeed judicial history under the Norman and Angevin Kings is a story of constantly increasing power and jurisdiction of the royal courts and a corresponding decay of the local tribunals.

The Curia Regis was composed of the king's tenants-in-chief, his important officials and others whose presence and assistance he desired. So large a body could not be kept in constant session and was too unwieldy to attend to the ordinary affairs of the kingdom. Much of the work had to be delegated. Consequently a smaller council composed mainly of the king's high officials gradually took over the every-day business of government. As the powers of kingly control were more extensively exercised and the duties of royal officials correspondingly increased, there was an inevitable tendency to division of labor and specialization of function. This was as true of judicial as



of other work. Thus by delegation of duties and by differentiation of function there was evolved from the Curia Regis a system of tribunals especially charged with the administration of royal justice.

**Itinerant Justices—Justices in Eyre.**<sup>6</sup> By sending delegates of the Curia Regis through the kingdom the central government was able to exercise control over local affairs. Through these delegates royal business of all sorts was done,—by them information for Domesday Book was collected, royal finance was administered and royal justice dispensed. In the early Norman period their visitations were uncommon, and their commissions usually of limited scope. Under Henry II they became more frequent, and later attained a certain regularity of schedule. During the thirteenth and first half of the fourteenth century, delegates or justices on general eyre made periodical visits under commissions granting them the widest powers. They stood in the place of the king himself. They constituted a most effective engine of government with possibilities for oppression or for beneficence. If Mr. Bolland is to be trusted, their chief object was to fill the royal coffers. To them all local officials, assemblies and tribunals must give letter-perfect accounts of their stewardship. There was a most meticulous searching of records, a most minute examination into happenings which affected the king. Every imperfection had to be paid for in money. And there were trials of cases, civil and criminal. All other courts were suspended in the county where these justices were sitting. For the time and place all justice was royal justice. And since they stood in the place of the king “to do right to poor and to rich,” they were not bound to follow the usual procedure of royal or local courts, and might entertain the most informally framed petitions and requests for redress of grievances. Indeed their jurisdiction was unlimited. But their judicial duties seem to have been of comparatively minor importance. They were hated and feared by the people, and they ceased to function before the latter half of the fourteenth century.

<sup>6</sup> See Bolland, *The General Eyre*; 1 *Eyre of Kent*, Selden Society, Introduction; *Select Bills in Eyre*, Selden Society, Introduction.

During this same period other delegates of the Curia Regis, other itinerant justices, were despatched through the land with more limited commissions. Some were charged with duties chiefly judicial,—to try prisoners in specified gaols, or to inquire as to crimes committed in certain counties and to hear and determine the accusations, or to try the new possessory actions. The justices of assize—as those assigned to try the possessory actions were called—were sometimes judges of one of the central courts, sometimes king's serjeants. By a series of enactments beginning in 1272, their powers were broadened until they attained a position of prime importance in the judicial system. Royal judges were also regularly sent to the counties to hear cases begun in the central courts. In this manner the royal courts and their more enlightened procedure were made accessible to the people, and the intolerable hardship which would otherwise have been caused by centralizing the administration of justice was avoided.

**Court of Common Pleas.** Although the justices on general eyre, in their role as royal extortioners, were an abomination to the people, the itinerant justices with merely judicial functions so demonstrated the value and need of their services as to cause a demand for the creation of what Professor George Burton Adams has called "a permanent itinerant justice court."<sup>7</sup> This was established in 1178. It was to sit permanently at Westminster and to be constantly available for hearing "*clamores*" of the realm, the actions between subject and subject. Questions of great difficulty it was to refer to the king for decision by him and the wiser men of the kingdom, the Curia Regis. Thus it was not a committee of the Curia Regis but a creature of it. Such was the origin of the Common Bench or Court of Common Pleas. It had exclusive jurisdiction of real actions and a theoretical monopoly of the older personal actions, debt, detinue, covenant and account. It had power to supervise the doings and correct the errors of the local courts. It acquired authority to try the newer personal actions, trespass and its offshoots. In the seventeenth century it was empowered to issue writs of habeas corpus and prohibition. From the beginning of

<sup>7</sup> See Adams, *Origin of English Courts of Common Law*, 30 Yale L. J. 798.

the fourteenth century it was crowded with business, and until the sixteenth century maintained a position of predominance as a court of first instance. Thereafter it had sharp competition from the courts of King's Bench and Exchequer.

**Court of King's Bench.** During the first half of the thirteenth century, unless Bracton is mistaken, the only royal courts were the Common Bench, the Itinerant Justices and the Curia Regis or King in Council. The Council had always exercised original jurisdiction over great men and great causes and the power to supervise other courts and correct their errors. Its composition for the performance of this function varied. At times it consisted of the king and a large assembly of the mighty; more often of the king and a small number of justices. Increase of judicial business made the larger assembly a practical impossibility except on rare occasions, so that gradually the smaller tribunal began to take on the appearance of a court separate and apart from the other. During the reign of Henry III the division was becoming noticeable, for in 1268 a chief justice was appointed for causes to be held *coram rege*; in the reign of Edward I, the separation was growing more marked; and during the fourteenth century it became complete. In the earlier career of the court the presence of the king at its sessions was a reality, but obviously its work could not stop when for long periods the king was unavailable, as during the minority of Henry III. Consequently though its hearings were always said to be in the presence of the king, that presence had become more or less of a fiction by the fifteenth century, if not before.

Its jurisdiction extended to civil and criminal causes. Few criminal actions were begun before it, but many originating in inferior courts were transferred to it because local conditions made a fair trial impossible or because perplexing problems of law were involved. It also had power to review the judgments of inferior courts in criminal cases, though no adequate appellate jurisdiction in criminal causes existed in England until 1907.

Its civil jurisdiction as a court of first instance did not include real actions or those personal actions where there was no allegation of force, or of injury to the person. Wrongs done *vi et armis* were within its province. Trespass and the actions

which grew out of it, it could properly entertain. But it was not content with these, and by a clever fiction it extended its powers and increased its revenue. The prison of the court was in charge of the Marshal of the Marshalsea of the King. Any prisoner in the keeping of the Marshal was under the jurisdiction of the court. Consequently, if a defendant in an action of trespass were taken into the custody of the Marshal, any form of personal action might be brought against him in the King's Bench. If plaintiff desired to sue defendant in debt in the King's Bench, he might first bring action of trespass and have defendant arrested and confined by the Marshal; then he could begin his action of debt and let the charge of trespass drop. Of course the complaint of trespass was false; its sole purpose was to bring defendant and the true cause of action within the jurisdiction of the court. Since the court was anxious to have this object accomplished, it furnished plaintiff all the requisite procedural aid. Plaintiff began by filing as a complaint in trespass a so-called bill of Middlesex. Upon the filing of the bill the sheriff of Middlesex was ordered to bring defendant before the court to answer the complaint in trespass. If defendant could not be found in Middlesex, plaintiff was given a writ of latitat to the sheriff of a neighboring county, which advised him that defendant was hiding and flitting about in his county and ordered the sheriff to apprehend him. If defendant was caught and delivered to the Marshal, then plaintiff might come on with his true complaint. If defendant gave bail and was released, he was still constructively in the custody of the Marshal, and the true action could go on. As the result of rulings that recitals in the court records of appearance and bail by defendant were conclusive evidence of his being in the custody of the Marshal, parts of the proceeding became fictitious. In some cases the plaintiff was permitted to enter appearance for defendant and give sureties for his further appearance at the trial. It is hardly necessary to say that these sureties were the same distinguished gentlemen who acted as plaintiff's pledges to prosecute the charge of trespass, those ubiquitous legal handymen, John Doe and Richard Roe. In this fashion did the King's Bench divert to itself much of the business properly within the exclusive jurisdiction of the Common Pleas, to its own profit and to the great detriment of the older tribunal. In vain did the Common Pleas

judges and their supporters in Parliament protest. The only statute which they were able to secure was easily circumvented by the lawyers and judges of the King's Bench. And it was not until the Common Pleas, under Chief Justice North after the Restoration, modified its procedure by a fiction similar to the bill of Middlesex that it retrieved a fair share of the litigation of the kingdom. The bill of Middlesex and the fictitious processes of the Common Pleas and Exchequer were abolished by the Uniformity of Process Act in 1832, but the jurisdiction of each, as it then existed, was not thereby changed.

As an appellate court in civil cases the King's Bench had almost exclusive jurisdiction in error during the thirteenth and part of the fourteenth century. Although a higher court later emerged, the King's Bench retained its power to correct the errors of all other courts except the Exchequer. In the exercise of its supervisory power over judicial and other officials it had authority to issue writs of Habeas Corpus, Certiorari, Prohibition and Mandamus.

**Court of Exchequer.** As early as the middle of the reign of Henry I the Curia Regis found it necessary to establish a committee on revenue, a sort of department of finance. Of this all its important officials were made members. The department was composed of two sections. The lower division, or Exchequer of receipt, took in and tested the money; the upper division audited and settled accounts and determined legal controversies concerning them. From this upper division was gradually evolved the Court of Exchequer. It is impossible to say just when it became a separate tribunal: for a long time its connection with the Curia was very close. Even in the early fourteenth century it is extremely difficult to distinguish its sessions from sessions of the Council.

As a subdivision of the Council its jurisdiction was inherently as broad as that of the Council. Doubtless it was created primarily to handle revenues. And in the latter part of the thirteenth century there was an earnest effort by ordinance and statute to limit its activities to that field. However, it never completely recognized this limitation, although from the early 1300s to the middle of the sixteenth century its business consisted almost exclusively of revenue cases. But thereafter it claimed and

exercised jurisdiction in actions at common law and suits in equity. Of course, it did not purport to disregard statute and ordinance. On the contrary, it gave them the most punctilious lip-service. Yet it avoided their effect by a simple artifice. There was no question that it had jurisdiction over the collection of revenue. If A were debtor to the crown, and B were debtor to A, the crown might collect from B or from B's debtor C, and so on to the end of the alphabet. Now if A could not collect from B, he was by so much the less able to account to the king; and to that extent A's claim against B directly concerned the royal revenue. It therefore fell squarely within the jurisdiction of the Court of Exchequer. Consequently A might get a *quo minus* writ, which would in the name of the king command the sheriff to bring B before the barons of the Exchequer to answer A's complaint that B owed him such a sum, whereby A "is the less (*quo minus*) able to satisfy us the debts which he owes us at our said exchequer," as he saith he can reasonably show that the same he ought to render." And likewise with other personal claims. The actual indebtedness of A to the crown was not material; only the allegation was required. By the same device the Exchequer entertained suits in equity. In 1832 the fictitious process was abolished, and in 1842 the Exchequer Court was deprived of equitable jurisdiction by statute.

**Court of Chancery.**<sup>8</sup> It will be remembered that immediately after the Norman Conquest justice for the ordinary man in the usual case was administered in the local courts. The notion that royal tribunals should be made available for all men and all causes was not yet conceived. But the idea that the King and his Curia were the great reservoir of justice for the entire kingdom was implicit in the assumption that they could and would provide a remedy in the exceptional case, where for one reason or another the local courts could not function effectively. As time went on, royal justice became more and more common. The cases where the Curia, or its delegates, or the courts which evolved from it exercised jurisdiction, grew in number and variety.

The device by which actions were normally brought into the

<sup>8</sup> See Adams, *Origin of English Equity*, 16 Columbia L. Rev. 87; *Select Cases in Chancery*, Selden Society, Introduction.

royal tribunals was a royal mandate or writ. By this writ issued in the name of the king the defendant was summoned before his justices, and they were authorized to hear and determine the controversy. Obviously neither the sovereign personally nor the Curia in assembly could handle the numerous applications for such writs. This business was committed to the Chancery, a department of government with the Chancellor at its head. And just as clearly, the Chancellor had to delegate the routine work to a body of subordinates. Set forms to fit the usual case were developed, and ordinarily the Chancellor's clerks had only to adapt them to the needs of the particular plaintiff. If no suitable form could be found, the Chancellor, in the first half of Henry III's reign, did not hesitate to manufacture a new one; and for a time it looked as if no litigant, able to pay the requisite fee, need be turned away from the courts of the crown. But in the latter half of the thirteenth century the Chancellor's power to frame new writs was greatly limited. Consequently, unless there was a formed writ which exactly or nearly fitted the applicant's case, he must generally take such inadequate relief as the inferior local courts offered, or go remediless.

But the source of royal justice was not dried up. The King and his Council could still grant relief in extraordinary cases. This was never denied. The general recognition of this power strikingly appears in the petitions made to justices on general eyre in the last years of the thirteenth century and the first part of the fourteenth. These justices were regarded as the direct representatives of the king. Litigants who could not afford to follow the regular procedure or whose adversaries were able to block the usual paths to relief, came before them in the most unconventional manner,—came with petitions poorly written, badly phrased, wrongly spelled. Alice,<sup>9</sup> after telling how Thomas had wronged her, said: "Alice can get no justice at all, seeing that she is poor and this Thomas is rich. Think of me, sir, for God's sake and for the Queen's soul's sake." In another prayer, she entreated: "For God's sake, Sir Justices, think of me, for I have none to help me save God and you." One suppliant<sup>10</sup> related how he had been so badly treated by Thomas, the forester

<sup>9</sup> Select Bills in Eyre (Shropshire Eyre, 1292), 2.

<sup>10</sup> Id. (Staffordshire Eyre, 1293), 52.

of Newcastle, that "for no treasure in the world would he have suffered this damage and shame put upon him" and prayed remedy "for the love of Jesus Christ and the Queen's soul's sake." And besides this, that same Thomas is a maintainer of pleas so that many have been oppressed by him and through his abetment; and if the sheriff have to come to inquire of the peace that same Thomas conveneth his court and telleth the people what folk the inquest must indiet, for they dare not go against his wishes." John Feyrewyn<sup>11</sup> addressed a justice thus: "Dear Sir, I ery merey of you who are put in the place of our lord the king to do right to poor and to rich." After describing how his adversary had defrauded him, and praying a return of his money, he promised: "As soon, my lord, as I get my money, I will go to the Holy Land, and there I will pray for the King of England and for you especially, Sir John of Berewiek, for I tell you that I have not a halfpenny to spend on a pleader; and so for this, dear Sir, be gracious unto me that I may get my money back." And the records show that the justices entertained these petitions and granted appropriate relief.

If mere delegates of the King and Council could thus disregard the restrictions of the formulary system, certainly the King and Council, acting directly, were beyond its limitations. Indeed, the very provisions which curbed the Chancery expressly affirmed the power of the King and Council to grant extraordinary relief and to direct the manufacture of new writs. And the litigant who was remediless by ordinary process, was not slow to seek this source of redress. He petitioned the King or the King in Council, or the King in Parliament, because his case was unusual, or his opponent was too powerful, or the offense too heinous, or the subject matter too difficult, or the usual remedies inadequate. In handling such petitions, naturally the Chancellor's assistance and advice must be sought. His office, better than any other, must know what eases the ordinary courts could and would generally entertain. He more than any other official would be likely to have a sound judgment as to the proper remedy. And when the applications became too numerous for the King or the Council or Parliament to manage, he was the member of the official family best fitted to take them over, and

<sup>11</sup> Id. (Shropshire Eyre, 1292), 6.



his office the best equipped to care for them. And so in the reign of Edward III an ordinance directed all matters of grace to be referred to the Chancellor. Consequently suppliants began to address their prayers to the Chancellor instead of to the King or the Council. Like the poor petitioners to the justices in eyre, they prayed relief "for God and in way of charity." Like them they gave reasons why the ordinary courts could not furnish adequate remedy. Henry Glanville<sup>12</sup> declared he could not get justice against one Champernoun "as the Common Law demands, because of his great maintenance." David Usque<sup>13</sup> asked the Chancellor to require his adversary to come and make answer, "Having consideration that the said William is so rich and so strong in friends in the country where he dwelleth, that the said David will never recover from him at common law, if he have not aid from your most gracious lordship."

Frequently the Chancellor had but to direct the applicant to the proper court. But at times, though a common law tribunal was competent to handle the subject matter, the parties were too powerful. Again, in a case of unusual content the Chancellor might issue a new and special writ to an existing court, but the judges on motion were too likely to quash it as unwarranted. Thus it fell out that the Chancellor or his deputies often had to hear and determine cases. So in the fourteenth and fifteenth centuries the Chancellor was performing the functions of a court, and by the end of the 1400s he can be said to be the head of an independent court separate and apart from the Council.

The procedure which was developed in Chancery differed materially from that of the common law courts. The summons to the defendant directed him to appear under penalty of forfeiting a specified sum of money, and was called a subpoena. He was not advised of the details of the complaint against him, but was commanded to come in and answer before the Chancellor the complaints made by the plaintiff. When he appeared, he had to respond under oath to every charge made in plaintiff's bill. The Chancellor decided all questions both of law and fact. His court did not consider itself bound by precedent. It administered the "rules of equity and good conscience." Ob-

<sup>12</sup> Select Cases in Chancery (1393), 11.

<sup>13</sup> Id. (1397-1399), 34, 35.

viously these must have been rather elastic and indefinite; and they aroused the disapproval and contempt of the common lawyers. Selden called chancery "a roguish thing" because it had no measure more constant than the length of the Chancery's foot. But gradually these rules lost their elasticity; decisions of the court were preserved and recorded, and they finally came to have the same effect in their proper sphere as the common law decisions in courts of common law.

As our cases of Henry and David show, the Chancery in the fourteenth century probably did not hesitate to take jurisdiction of a cause merely because its subject matter fell within the cognizance of the courts of common law. And he doubtless conceived of himself as applying the same rules which the common law would enforce in the same cases. His less costly and more effective procedure attracted litigants. But this fact aroused the opposition of the common law judges and lawyers and of Parliament, with the result that he was deprived of jurisdiction generally in those cases in which the common law courts could furnish a reasonably satisfactory remedy. This is no place to tell the story of the decline of Chancery in the seventeenth and eighteenth centuries from the efficient court of the poor litigant to the scandalous tribunal of *Jarndyce v. Jarndyce*, or of its reorganization in the nineteenth century. Suffice it to say that before the Judicature Acts of 1873 and 1875 the following had occurred: (a) The court had acquired additional business as a result of the abolition of the jurisdiction in equity of the Court of Exchequer. (b) It had lost jurisdiction in bankruptcy, which had been vested in a new court, the London Court of Bankruptcy. (c) Its trial judges were the Master of the Rolls and three Vice-Chancellors. (d) A court of intermediate appeal had been established consisting of two Lords Justices in Chancery and the Lord Chancellor, assisted by the Master of the Rolls, the Vice-Chancellors or any of the judges. This court also had jurisdiction of appeals in bankruptcy. (e) Final appeal lay to the House of Lords.

**Courts of Admiralty.**<sup>14</sup> In the early 1300s local courts of seaport towns were the regular tribunals for maritime causes.

<sup>14</sup> See *Select Pleas in the Court of Admiralty*, Selden Society, Introduction.

But they were not efficient. The King and Council were persistently petitioned for relief, and great difficulty was experienced in adjusting with foreign governments and their subjects claims by and against English subjects for piracy. About the middle of the century jurisdiction over such matters was conferred upon the several admirals and their courts. Early in the next century it was vested in the Lord High Admiral and his court. In the second half of the 1500s this tribunal increased tremendously in importance. It extended its power to cover all sorts of transactions involving commerce and shipping, all contracts made outside the realm, all torts committed on tidal waters, wreck and stranded property, and spoil or prize. This expanding jurisdiction aroused the antagonism of the common law courts, and under the leadership of Coke they succeeded in the seventeenth century in reducing its scope in civil cases to an unimportant minimum. By legislation in the nineteenth century, the court was again clothed with extensive powers over maritime causes. In its earlier history appeals from its judgments lay to the King in Chancery. Since 1833 they have lain to the Judicial Committee of the Privy Council.

**Other Courts of Special Jurisdiction.** It would be unprofitable to describe in detail the various courts of fairs and markets which enforced the usages and customs of merchants in non-maritime cases. Their functions were later absorbed by the royal courts of common law. No separate national tribunals were established to administer the nonmaritime law merchant.<sup>15</sup>

Likewise it seems unnecessary to treat of the long struggle between the royal courts and the ecclesiastical courts. In the twelfth and thirteenth centuries the Roman Catholic Church had a magnificent system of courts with the Roman Curia as the tribunal of last resort. They asserted jurisdiction over all causes, civil and criminal, in which an ecclesiastic was the defendant or the accused; and over certain other litigation on the ground that its subject matter had to do with church economy or with the enforcement of moral or spiritual duties. On this basis they entertained cases concerning marriage, divorce, legitimacy, wills, and promises made on oath or pledge of faith. Ultimately they were shorn of practically all judicial power and were confined to the

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<sup>15</sup> See *Select Cases on the Law Merchant*, Selden Society, Vol. I, Introduction.

regulation of the polity and internal discipline of the church. In 1857 their jurisdiction over divorce and matrimonial causes was given to the Divorce Court and that over testamentary matters to the Court of Probate.

**Court of Exchequer Chamber.** When the Court of Exchequer definitely emerged as a separate tribunal trying common law causes, the Court of King's Bench claimed jurisdiction to correct its errors. But it was unable to establish such a supervisory power; and rightly so, for two reasons. The Exchequer was not a common law court; and the Exchequer in origin and evolution was co-ordinate with the King's Bench. It was not a creature of the Curia Regis as was the Court of Common Pleas, but was as truly a branch of the Council as the King's Bench. To provide a court for the correction of errors of the Exchequer the Statute of 31 Edward III (1357-8) established the Court of Exchequer Chamber composed of the Chancellor of the Exchequer and the Treasurer assisted by "the justices and other sage persons."

A second Court of Exchequer Chamber was created in 1585 for the correction of errors of the Court of King's Bench. The statute of 27 Elizabeth, after reciting that errors in the King's Bench could be corrected only by Parliament and that Parliament met but infrequently, set up a new court with power to correct the errors of the King's Bench in certain cases originating therein. It had no jurisdiction over decisions in the King's Bench on error from the Common Pleas. Its judges were the judges of the Common Pleas and the Barons of the Exchequer. Any six of them might render judgment. From such judgment a further appeal lay to Parliament. In 1830 these two courts were consolidated. Jurisdiction in error was taken from the Court of King's Bench, and this new Court of Exchequer Chamber was given appellate jurisdiction over the Courts of Common Pleas, King's Bench and Exchequer. Its judges in any case consisted of the judges of the two courts other than that from which the appeal was taken. It was abolished by the Judicature Acts.

**House of Lords.** During the Norman period all the powers of government were vested in the King and the Curia Regis. The volume and complexity of the business of the central gov-

ernment soon required delegation of powers and duties and differentiation of function. The necessity of administering justice to an ever increasing number of complainants caused the creation and development of various courts. These were, and for a long time in theory remained, mere agencies or creatures of the King in Council. The King in his Council or the King in his Council in Parliament continued to be the well-spring of all royal justice. Here lay the power of original jurisdiction over any cause, though the requirements of practical administration might limit its exercise to exceptional cases; here lay the power of final correction of errors of all other courts. In the course of the thirteenth century the King and his Curia had to share the powers of government with the representatives of the counties and boroughs. These in 1333 became the House of Commons. The great magnates, lay and ecclesiastical, of the Curia Regis at the same time became the House of Lords. Since the Commons were a part of Parliament, and since they doubtless had a share in legislation, did they become a part of the King's Council in Parliament for judicial purposes? Though there was no disposition in the fourteenth and fifteenth centuries to draw any clear-cut distinction between judicial and legislative functions, it seems reasonably certain that the Commons made no serious claim of right to share in the judicial work of the Council. That they possessed no such authority was the opinion of the judges in 1485, and this view prevailed in practice. The Council of the King in Parliament was a session of the House of Lords.

To what extent did the Lords succeed to the judicial privileges and duties of the old Curia? In civil cases they asserted original jurisdiction over such causes as they desired to hear, and could cite early precedents to support them. But in the seventeenth century the Commons so strenuously opposed this claim that the Lords were forced to relinquish it. The power of the old Curia to remove to itself actions pending in the courts, the Lords allowed to die from disuse. But they did retain and exercise the authority to review and correct the errors of the King's Bench, the Exchequer Chamber and the common law side of Chancery; and in the latter part of the seventeenth century they made good their claim of authority to hear appeals from the equity side of Chancery. The House

of Lords was therefore the appellate court of last resort in civil cases in law and equity. In criminal cases it lost by the middle of the seventeenth century nearly all original jurisdiction. It did, however, establish and maintain its right to try peers accused of felony or treason. In such trials it acts as a jury with the Lord High Steward presiding as judge. And at present under the Criminal Appeal Act of 1907 it may hear appeals from judgments of the Court of Criminal Appeal upon certificate from the Attorney-General.

**The Privy Council.** As the courts of King's Bench, Exchequer and Chancery were slowly emerging and becoming distinguishable from the Curia Regis; as the great magnates were separating themselves into the House of Lords, that group of royal officials and professional advisers who stood closest to the sovereign and were prone to magnify his office, were becoming segregated as a select or privy council. As such it tended to become an executive body, but it retained rather indefinite and extensive judicial powers. Parliament had little confidence in it. The common law courts denied its right to review their judgments. Cases involving freehold, treason or felony were removed from its jurisdiction. In the half-century following 1435, while Chancery was growing in strength, the Council was on the decline, but during the Tudor period, it attained a masterful position in the government. At the opening of the sixteenth century the Council was separating into two divisions, one following the king and attending chiefly to executive and administrative duties, the other remaining at Westminster and taking care principally of judicial work. The latter met in the Star Chamber. Its official title became "The Lords of the Council sitting in the Star Chamber." It later assumed almost the appearance of a court distinct from the Council, though it always remained in fact and in legal theory a division of the Council. Under the Tudors it exerted a most beneficial influence: it furnished expeditious, inexpensive and effective justice in civil and criminal cases. But under the Stuarts, on account of its baneful political activities it became anathema. It was abolished in 1641 by an act which struck down most of the judicial power of the Privy Council. Indeed almost the only jurisdiction left to it was over appeals from the foreign dominions of the crown. Colonial

expansion soon made this a power of primary significance. From the beginning it was administered by a committee of the Council. Thus it has come about that the Judicial Committee of the Privy Council is a most important court of last resort. By statute it was given final appellate jurisdiction also in Admiralty and Prize cases.

**Reorganization and Consolidation.**<sup>16</sup> Thus, just prior to the Judicature Act of 1873, the English system comprised eight principal courts of original jurisdiction besides the Courts of Assize, Gaol Delivery and Oyer and Terminer. These were the King's Bench, Common Pleas, Exchequer, Chancery, London Court of Bankruptcy, Admiralty, Probate, and Divorce. And four courts with appellate jurisdiction, namely, Exchequer Chamber, Chancery Appeals, House of Lords, and Judicial Committee of the Privy Council. From King's Bench, Common Pleas, and Exchequer writ of error lay to the Exchequer Chamber and thence to the House of Lords; from Chancery and the London Court of Bankruptcy there was an appeal to Chancery Appeals and thence to the House of Lords; from Probate and Divorce a direct appeal to the House of Lords, and from Admiralty to the Judicial Committee of the Privy Council. By the Judicature Act and its amendments all these courts except the House of Lords and Privy Council were consolidated and erected into the Supreme Court of Judicature. This was divided into the High Court of Justice and the Court of Appeal. To the former was given all original jurisdiction formerly possessed by the consolidated tribunals, and to the latter all the jurisdiction theretofore exercised by Chancery Appeals and the Exchequer Chamber, that exercised by the Judicial Committee of the Privy Council in lunacy cases and in admiralty cases other than Prize cases, and the power to set aside verdicts and judgments of the High Court of Justice and grant new trials therein. From the Court of Appeal, an appeal lies to the House of Lords. "For the more convenient dispatch of business in the said High Court of Justice (but not so as to prevent any judge from sitting whenever required in any divisional court or for any judge of a different division from his own)," the court was divided into five divisions: (1) Chancery, (2) King's Bench,

<sup>16</sup> See Kales, *The English Judicature Acts*, 4 *Journal of American*

(3) Common Pleas, (4) Exchequer, (5) Probate, Divorce and Admiralty. In 1881 the King's Bench, Common Pleas and Exchequer were merged into one division as the King's Bench, so that the High Court now has but three divisions.

As heretofore pointed out there was no satisfactory method of reviewing criminal cases in England until 1907. It was an ancient practice for the judges when in doubt of the accused's guilt under the law to take a special verdict from the jury, or to reserve a doubtful point for the consideration of the judges. This latter practice was given statutory sanction in 1848 by the creation of the Court of Crown Cases Reserved. If the reserved point was decided in favor of the convicted prisoner, he was pardoned. The reservation was entirely within the discretion of the trial judge. The Criminal Appeal Act of 1907 established a Court of Criminal Appeal with power to hear appeals upon questions of law and fact and upon the propriety of the sentence, and to affirm or quash convictions, and to affirm or modify sentences. Appeal lies from its decision to the House of Lords only upon a certificate by the Attorney-General that a point of law is involved "of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought."

**Military Tribunals.** For the administration of laws applicable to members of the military and naval establishments military and naval courts have functioned in England from ancient times. In time of war they have jurisdiction also over certain classes of civilians. In territory under military government or martial law military commissions and provost courts frequently have complete control of the administration of justice. Further description of them is beyond the purpose of this chapter.

#### COURTS OF THE UNITED STATES<sup>17</sup>

**Federal Judicial Power.** The judicial power of the government of the United States is granted in Section 2 of Article III of the Constitution:

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

<sup>17</sup> See Rose's Federal Jurisdiction and Procedure (3 ed.), *passim*.



Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other Public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

It is limited by the Eleventh Amendment:

#### AMENDMENT XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**Federal Courts.** Although there had been in colonial America the same general lack of discrimination between executive, legislative and judicial powers as in contemporary England, the Constitution attempted to draw sharp lines between them and to place each in a separate department. Section 1 of Article III of the Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

The Supreme Court is the only court of the United States established by the Constitution. The presently existing courts which Congress has established under Section 1 of Article III are the Circuit Courts of Appeals, the District Courts of the United States, the District Courts of the United States for the District of Columbia and the United States Court of Appeals for the District of Columbia. These are usually called constitutional courts, and in their capacity as such are limited in their jurisdiction by Section 2 of Article III.<sup>18</sup> Section 1 of that Article does not exhaust the power of Congress to create courts. Under Article IV Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," and this includes power to establish territorial courts.<sup>19</sup> The Court of Claims is "a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States."<sup>20</sup> It is, therefore, not a constitutional court. "The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution."<sup>21</sup> Its jurisdiction was enlarged and its name changed to United States Court of Customs and Patent Appeals by the Act of March 2, 1929, ch. 488, 45 Stat. 1475, but the added jurisdiction was obviously not attributable

<sup>18</sup> It was once thought established that constitutional courts "share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise." *Ex parte Bakelite Corp.*, 279 U. S. 438, 449. But see *O'Donoghue v. United States*, 289 U. S. 516, 543 et seq. as to jurisdiction of courts of the District of Columbia.

<sup>19</sup> See *O'Donoghue v. United States*, 289 U. S. 516, 535 (1933).

<sup>20</sup> *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929), quoted and approved in *Williams v. United States*, 289 U. S. 553, 569 (1933).

<sup>21</sup> *Ex parte Bakelite Corp.*, 279 U. S. 438, 458 (1929).

to Article III. The Revenue Act of 1942 changed the name of the Board of Tax Appeals to the Tax Court of the United States without changing its jurisdiction or membership. If it is to be classed as a court rather than as an administrative tribunal, it falls without the confines of Article III. Therefore the Territorial Courts, the Court of Claims, the Court of Customs and Patent Appeals and the Tax Court of the United States are ordinarily termed legislative courts.<sup>22</sup>

**The District Courts.** The United States is by Act of Congress divided into judicial districts. Each state constitutes at least one district, and no district includes territory in more than one state. Section 24 of Chapter 2 of the Judicial Code now enumerates twenty-eight classes of actions of which the district courts have original jurisdiction:

1. Actions of a civil nature (a) brought by the United States or by any officer thereof authorized by law to sue, or (b) between citizens of the same state claiming lands under grants from different states, or (c) arising under the Constitution or laws of the United States or treaties made under their authority where the matter in controversy exceeds \$3,000 exclusive of interest and costs, or (d) between citizens of different states where the matter in controversy exceeds \$3,000 exclusive of interest and costs, or (e) between citizens of a state and foreign states, citizens or subjects where the matter in controversy exceeds \$3,000 exclusive of interest and costs. But the foregoing is subject to two limitations: First, no district court has jurisdiction of an action to enjoin the enforcement, operation, or execution of any order of an administrative board or commission of a state or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with such an order where jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Constitution of the United States where the order affects rates chargeable by a public utility, does not interfere with interstate commerce, and has been made after reasonable notice and hearing, and a plain, speedy, and efficient remedy may be had at law or in equity in the courts of that state. Second, no

<sup>22</sup> For difficult problems raised by the classification, see 34 *Columbia L. Rev.* 344 (1934); 43 *Yale L. J.* 316 (1933).

district court has jurisdiction of an action to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of a state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of that state.

By Act of April 20, 1940, this subdivision of section 24 was amended so as to include in the diversity of citizenship clause actions "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory." Prior to this amendment, it was generally held that the district courts had no jurisdiction on grounds of diversity of citizenship where one of the parties was a citizen of the District of Columbia or of a territory. The constitutionality of the amendment has been challenged.<sup>28</sup>

2. Crimes and offenses cognizable under the authority of the United States.

3. All civil causes of admiralty and maritime jurisdictions, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it"; all seizures on land or waters not within admiralty and maritime jurisdiction; all prizes brought into the United States, and all proceedings for the condemnation of property taken as prize. But there is no jurisdiction of causes arising out of injuries to or death of persons, other than the master or members of the crew of a vessel, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States.

4. Actions arising under any law relating to the slave trade.

5. Actions arising under any law providing for internal revenue, or revenue from imports or tonnage, except those of which jurisdiction has been conferred upon the Court of Customs and Patent Appeals.

6. Actions arising under the postal laws.

7. Actions arising under the patent, copyright, and trademark laws.

8. Actions and proceedings arising under any law regulating commerce.

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<sup>28</sup> See *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 165 F.2d 531 (C. C. A. 4th 1947), holding the amendment unconstitutional, and *Ostrow v. Samuel Brilliant Co.*, 66 F. Supp. 593 (D. C. D. Mass., 1946), citing all previous cases and 55 Yale L. J. 600 (1946).

9. Actions and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

10. Actions by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

11. Actions to recover damages for injuries to person or property on account of any act done by plaintiff, under any law of the United States, for the protection or collection of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states.

12. Actions authorized by law to be brought for injury to person or property or for deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in Section 7 of Title 8. (This section deals with conspiracies to prevent a person from accepting office or discharging the duties of office, or to intimidate or injure a party, witness or juror, or to deprive a person of the equal protection of the laws or the privileges and immunities of a citizen.)

13. Actions authorized by law, against a person who, having knowledge that any of the wrongs mentioned in section 7 of Title 8 are about to be done, and, having power to prevent or aid in preventing them, neglects or refuses to do so.

14. Actions authorized by law to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States.

15. Actions authorized by law to recover possession of any office where the sole question as to the title to the office arises out of a denial of the right to vote on account of race, color or previous condition of servitude; which right is guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the states.

16. Actions commenced by the United States, or by direction of any officer thereof, against any national banking association, and actions for winding up the affairs of any such bank; and of all actions brought by any banking association established in the district for which the court is held, under the provisions of chapter 2 of Title 12, to enjoin the Comptroller of the Currency or any receiver acting under his direction, as provided by said chapter.<sup>24</sup>

17. Actions by an alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

18. Actions against consuls and vice consuls.

19. All matters and proceedings in bankruptcy.

20. Actions on certain claims on contract, express or implied, not sounding in tort and not exceeding \$10,000 and actions for refund of internal revenue taxes or penalties improperly collected where the collector of internal revenue who collected the tax or penalty is dead or no longer in office. (This is the so-called Tucker Act, and must be studied in detail for its limitations.) [Under the Act of August 2, 1946, amended by the Act of August 1, 1947, actions against the United States for damage to person or property or for wrongful death are within the exclusive jurisdiction of the United States district court of the district in which plaintiff resides or in which the wrongful act or omission occurred. 28 U. S. C. A. 931.]

21. Actions to enjoin violations of laws of the United States to prevent the unlawful enclosure of public lands.

22. Actions arising under any law regulating the immigration of aliens, or under the contract labor laws.

23. Actions and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

24. Actions and proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

25. Actions for partition of land where the United States is one of the joint tenants or tenants in common.

<sup>24</sup> This is followed by a sentence making a national banking association, for the purpose of all other actions against it, a citizen of the state in which it is located.

26. This is the United States Interpleader Act of 1936. It should be read in detail and should be considered in conjunction with Rule 22 of the Federal Rules of Civil Procedure. The amount in dispute under the act need not exceed \$500.

27. Actions for the enforcement of any order of the Interstate Commerce Commission.

28. Actions brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

There are numerous other statutory provisions governing the jurisdiction of the district courts. For example, the mere fact that one of the parties is a corporation incorporated by or under an Act of Congress does not confer such jurisdiction unless the United States owns at least one-half of its stock, or unless the action arises out of a transaction involving international or foreign banking or banking in a dependency or insular possession of the United States or out of other international or foreign financial operations. By special enactments the district courts are given jurisdiction over actions in which a Federal Reserve Bank is a party, actions arising under Anti-Trust Acts, the Securities Act, the Securities and Exchange Act, the Public Utilities Holding Act, the Federal Communications Act, the Federal Employers' Liability Act and actions on Veterans' Contracts of Insurance, and certain claims for tort against the United States. They have exclusive jurisdiction over proceedings to foreclose mortgages on vessels under the Ship Mortgage Act. There are other miscellaneous provisions, so that an investigator can never be certain concerning the exact extent of their jurisdiction until he has made an exhaustive search of pertinent Federal legislation.

By section 256 of the Judicial Code, the United States courts have exclusive jurisdiction of the following:

"First. Of all crimes and offenses cognizable under the authority of the United States.

"Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

"Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fifth. Of all cases arising under the patent-right or copyright laws of the United States.

"Sixth. Of all matters and proceedings in bankruptcy.

"Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

"Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls."

Of the foregoing matters, the supreme court has exclusive original jurisdiction of actions where a state is a party, except actions between a state and a citizen or an alien, and actions against ambassadors and other public ministers or their domestic servants. In actions between a state and its citizens or between a state and citizens of other states or aliens, and in actions brought by ambassadors or other public ministers, or in which a consul or vice consul is a party, it has original jurisdiction but not exclusive original jurisdiction.

**Removal of Causes.**<sup>25</sup> Provision is also made for removal to the district courts from the courts of the separate states of certain causes which might have been originally brought in such district courts. They fall into eight groups:

1. Cases involving a federal question.—Actions arising under the Constitution, laws or treaties of the United States where the matter in controversy exceeds \$3,000 exclusive of interest and costs are removable upon petition of defendant. Under the decisions it is settled that the federal ground must appear on the face of the complaint as a part of the plaintiff's statement of claim and not as an anticipated defense; nor is it sufficient that defendant's answer raises a federal question.

2. Cases with parties of diverse citizenship.—Civil actions where the matter in controversy exceeds \$3,000 exclusive of

<sup>25</sup> See, generally, Judicial Code Secs. 23-34, 28 U. S. C. A., 71-77.



interest and costs, and all defendants are nonresidents of the state and each is a citizen of a state different from that of any plaintiff are removable upon the petition of the defendant or defendants. It will be noted that Section 2 of Article III of the Constitution speaks of controversies "between Citizens of different States" as does section 24 of Chapter 2 of the Judicial Code, while this particular clause of section 28 specifies "non-residents." There is some conflict in the cases as to whether nonresident must be construed to mean noncitizen.<sup>26</sup> While a corporation is not a citizen, the result reached in interpreting this provision is the same as if it were a citizen of the state in which it is incorporated. The courts first disregard the corporate entity and look to the citizenship of the incorporators and then create an irrebuttable presumption that the incorporators are citizens of the state of incorporation. Except where there is a separable controversy or a separate claim, all defendants must join in the petition for removal to make it effective.

3. Separable federal controversy.—Where the district court would have had original jurisdiction of an action as belonging to either of the foregoing groups, and there is in the action a separable controversy wholly between citizens of different states, the action may be removed on petition of the defendant or defendants interested in the separate controversy.

Where there has been a joinder of separate claims (often designated as separate causes of action) and the necessary diversity exists as to one or more of the separate claims, that claim or those claims may be removed, and the remaining claims be retained in the state court.<sup>27</sup> Where there is a separable controversy as to a single claim and the requisite diversity, the entire claim is removable. Needless to say, it is often very difficult to distinguish between a separate claim and a separable controversy.<sup>28</sup> This provision as to separable controversy applies only

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<sup>26</sup> No amendment to the provision for removal similar to the 1940 amendment to the section governing original jurisdiction has been made.

<sup>27</sup> See *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023, 1027 (C. C. A. 2d, 1931).

<sup>28</sup> See 41 Harv. L. Rev. 1048 (1928). The proposed revision of the Judicial Code eliminates the "separable controversy" provision. See 60 Harv. L. Rev. 431 (1947).

where the controversy is wholly between citizens of different states; consequently an alien is not within its terms.<sup>29</sup>

4. Cases affected by prejudice or local influence.—Where an action is brought in a state court by a citizen of the state against a nonresident defendant, the latter may have it removed upon a showing that he cannot have a fair trial in the state court on account of local prejudice or local influence.

The supreme court has held that this clause does not furnish a separate and independent ground of jurisdiction. Therefore, if the ground is diversity of citizenship, the requisites of clause 2 must be complied with including the jurisdictional amount, but if there are several defendants, it is not necessary that all join in the petition for removal.<sup>30</sup>

5. Claims under land grants from different states.—Where in any action in a state court (a) the title of land is concerned, and (b) the parties are citizens of the same state, and (c) the matter in dispute exceeds \$3,000, including interest and costs, and (d) the parties are claiming under grants from different states, either party may, on prescribed conditions, remove the action to the district court.

This clause no longer has any practical application.

6. Actions against one denied civil rights.—Any action or criminal prosecution commenced in a state court against a defendant who is denied or cannot enforce in the state court a right secured to him by any law providing for equal civil rights, may be removed on petition of the defendant. The same is true if the defendant is sued for any arrest or other wrong committed "by virtue of or under color of authority derived from" any law providing for such equal civil rights, or for refusing to do any act on the ground that it would be inconsistent with such law.<sup>31</sup>

The accepted construction of the first provision limits the right of removal to such a denial "arising from some state law, statute, regulation or custom," that is, from "hostile state legislation," as distinguished from illegal or corrupt acts of ad-

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<sup>29</sup> See *Tillman v. Russo Asiatic Bank*, supra, n. 27.

<sup>30</sup> See *Cochran v. Montgomery County*, 199 U. S. 260, 270-274 (1905).

<sup>31</sup> Judicial Code, Sec. 31, 28 U. S. C. A., 74.

ministrative officers unauthorized by the Constitution or laws of the state.<sup>32</sup>

7. Actions or prosecutions against revenue officers, officers of United States courts, or officers of Congress.—Any civil action or criminal prosecution brought (a) against a revenue officer or one acting under his authority on account of any act done under color of office or under a revenue law, or against one holding property derived from any such officer, if the proceeding affects the validity of any such revenue law, or (b) against any officer of a court of the United States on account of any act done under color of his office or in the performance of his duties as such officer, or (c) against any person on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, may be removed on petition of the defendant.

8. Cases against civil officers of the United States.—Any personal action brought by an alien against a civil officer of the United States who is a nonresident of the state may on petition of the defendant be removed to the United States district court of the district in which he was personally served with process.

The following pertinent provisions should be noted:

(1) In the cases of the first three groups the petition for removal must be made before the time limited by the state law or practice for answering or pleading; in the other groups, it may be made at any time before trial.

(2) No case arising under the Federal Employers' Liability Act brought in a state court of competent jurisdiction may be removed to any court of the United States. Whether this prohibition was included by incorporation in the so-called Jones Act allowing a common law action for injuries or death of seamen has been the subject of conflicting decisions in the district courts. The prevailing opinion is that such actions brought in a state court are not removable.<sup>33</sup> Whether the separable controversy provision modifies this provision is questionable.<sup>34</sup>

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<sup>32</sup> *Kentucky v. Powers*, 201 U. S. 1, 27 (1906).

<sup>33</sup> See opinion of Hand, J. in *Martin v. United States Shipping Corp.*, 1 F.2d 603 (S. D. N. Y., 1924).

<sup>34</sup> See *Jacobson v. Chicago, M., St. P. & P. R. Co.*, 66 F.2d 688, 694 (C. C. A. 8th, 1933); cf. 3 *Moore's Federal Practice* 3511 (1938).

(3) Actions against a railroad company or other common carrier for delay, loss of, or injury to, property under the Interstate Commerce Act where the matter in controversy does not exceed \$3,000 exclusive of interests and costs, are not subject to removal.

**Court of Claims.** This court, established in 1855, is continued in existence by the Judicial Code. Its jurisdiction is fixed by section 145 thereof. In brief it has authority to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the government of the United States, or for damages, liquidated or not liquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable;" likewise all set-offs, counterclaims, claims and demands of the United States against any claimant in said court. It also may entertain and decide the "claim of any paymaster, quartermaster, commissary of subsistence or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible."

The court has no jurisdiction over (a) claims for pensions or (b) claims growing out of the Civil War or (c) claims barred on March 4, 1915 by the provisions of any law of the United States or (d) any claim not pending on December 1, 1862, growing out of or dependent on any treaty or (e) any claim in respect of which the claimant or any assignee of his has pending in any other court any action or process against any person who at the time the cause for the claim arose was acting or professing to act under the authority of the United States. From time to time Congress has passed acts regulating the jurisdiction of the court; for example, the Act of August 30, 1935, amended July 13, 1943, extending jurisdiction to certain claims for damage to oyster growers from dredging operations; the Act of July 23, 1937, governing certain claims of contractors arising

out of construction of dams and locks on the Mississippi River; and the Act of August 13, 1946, concerning certain claims arising after August 13, 1946, of any tribe or identifiable group of American Indians residing within the territorial limits of the United States or Alaska.

Aliens who are citizens or subjects of any government which gives to citizens of the United States the right to prosecute claims against that government in its courts have the privilege of prosecuting against the United States in the Court of Claims any claim within the court's jurisdiction.

The court has authority in any case to certify to the Supreme Court definite questions of law concerning which instructions are desired for the proper disposition of the case; and the Supreme Court may on certiorari review decisions of the court acting in its judicial capacity,<sup>35</sup> for errors of law, lack of substantial evidence to support a finding, and failure to make a finding on a material issue.

**Court of Customs and Patent Appeals.**<sup>36</sup> In 1909 the Court of Customs Appeals was established with appellate jurisdiction to review decisions of a board of general appraisers. In 1926 the name of this board was changed to United States Customs Court. Prior to 1929 an applicant for a patent and parties who claimed that the issuance of the patent would interfere with an existing patent had an appeal from an adverse determination to an administrative tribunal within the Patent Office, whose decisions were appealable to the United States Court of Appeals for the District of Columbia. In 1929 the Court of Customs and Patent Appeals was created and vested with the jurisdiction of the Court of Customs Appeals, and with that which the Court of Appeals for the District of Columbia had in patent appeals prior to April 1, 1929. In appeals from the Customs Court it has "exclusive appellate jurisdiction to review by appeal . . . final decisions by the United States Customs Court in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the juris-

<sup>35</sup> See *Pope v. United States*, 323 U. S. 1 (1944).

<sup>36</sup> See Judicial Code, Sec. 195, 28 U. S. C. A. 308, as amended.

diction of said court, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs and Patent Appeals shall be final in all such cases." In patent cases it has jurisdiction of appeals from decisions of the Patent Office, but this does not interfere with the right of a party to relief in equity or with the jurisdiction in equity of the Court of Appeals for the District of Columbia.

Provision is made for review of decisions of the Court of Customs and Patent Appeals by the Supreme Court.

**Circuit Court of Appeals.**<sup>37</sup> In 1891, in order to relieve the Supreme Court from an intolerable amount of labor, Congress divided the federal judicial districts into nine groups or circuits, and established a Circuit Court of Appeals for each circuit. In 1929 a tenth circuit was created by a division of the eighth circuit. These courts have no original jurisdiction and are strictly appellate tribunals. They review on appeal (a) all final judgments of the district courts of the United States, of Hawaii, Puerto Rico, Alaska, the Virgin Islands and the Canal Zone, (b) certain final judgments of the Supreme Courts of Hawaii and Puerto Rico, and (c) specified interlocutory orders of United States district courts in actions for injunctions, in receivership proceedings, in arbitration awards under the Railway Labor Act, and in admiralty. They have appellate and supervisory jurisdiction over proceedings in bankruptcy, and power to enforce, set aside or modify certain orders of the Federal Trade Commission, the Interstate Commerce Commission, and the Board of Governors of the Federal Reserve System.

The jurisdiction of these courts may at any time be enlarged or curtailed by Congress, and the latest legislative provisions must be consulted by the student. They may certify to the Supreme Court questions of law concerning which they desire instructions for the proper decision of a pending case. Their judgments may be re-examined by the Supreme Court on certiorari. Where a United States Circuit Court of Appeals has held a state statute invalid as repugnant to the Constitution,

<sup>37</sup> See Mr. Chief Justice Taft, *Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 Yale L. J. 1; Bunn, *The New Appellate Jurisdiction in Federal Courts*, 9 Minn. L. Rev. 309.

treaties or laws of the United States, its judgment may be reviewed by the Supreme Court on appeal by the party relying on the state statute.

The jurisdiction of the Court of Appeals for the District of Columbia is regulated by acts of Congress dealing with that court; review of its decisions by the Supreme Court is governed by the same provisions as those regulating review of decisions of the United States Circuit Courts of Appeals.

**Supreme Court.** The Supreme Court has original jurisdiction in civil actions where a state is a party, and exclusive jurisdiction of such actions against ambassadors or other public ministers, and nonexclusive jurisdiction of all suits by ambassadors or other public ministers and suits in which a consul or vice-consul is a party. Its appellate jurisdiction is as follows:

A. From decisions of the United States Circuit Courts of Appeals and of the Court of Appeals of the District of Columbia as stated in the preceding section. See also paragraph C, *infra*.

B. From decisions of the United States District Courts as provided in

(1) Section 29 of Title 15 of the United States Code and in section 45 of Title 49. Section 29 of Title 15 provides for appeal only to the Supreme Court in actions in equity where the United States is a party under the act regulating monopolies and combinations in restraint of trade. Section 45 of Title 49 deals with actions in equity in which the United States is a party under the Interstate Commerce Act.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States. This refers to appeals by the United States in criminal cases.

(3) Section 380 of Title 28, which permits appeals from interlocutory or final orders or judgments of a three-judge court granting or refusing an injunction restraining the enforcement, operation or execution of a statute of a state.

(4) Those portions of sections 47 and 47a of Title 28 which deal with the review of interlocutory and final judgments in actions to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7, which deals with enforcement of orders of the Secretary of Agriculture regarding stockyards

and stockyard dealers and for such purposes in effect classifies his orders with those of the Interstate Commerce Commission. See also paragraph C immediately following.

C. From the decision of any court of the United States (which includes any court of record of Alaska, Hawaii and Puerto Rico, the United States Customs Court, the Court of Customs and Patent Appeals, the Court of Claims, any district court of the United States, and any circuit court of appeals) in any action or proceeding in which the United States or its agency, officer, or employee as such is a party or in which the United States has intervened and in which the decision is against the constitutionality of any Act of Congress.

D. From a final judgment or decree of the highest court of a state in which a decision in the action could be had.

(1) By appeal, where in the action (a) the validity of a treaty or statute of the United States is drawn in question and the decision is against its validity, or (b) the validity of a statute of a state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

(2) By certiorari, (a) in the cases specified in (1) above, whether the decision is in favor of or against the validity of the treaty or statute; or (b) where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

The student must bear in mind that the foregoing provisions may be changed by Act of Congress in any way not repugnant to Article III of the Constitution and the Eleventh Amendment.

**Military Tribunals.**<sup>38</sup> Military tribunals are of three sorts, military commissions, provost courts and courts-martial. The

<sup>38</sup> The following references will be helpful to the student. Glenn and Schiller, *The Army and the Law* (N. Y., 1943)—a brief work with voluminous references to pertinent materials; Wiener, *Military Justice for the Field Soldier* (Wash., 2 ed, 1944): *Manual for Courts-Martial* corrected to 1943 (U. S. Gov't Printing Office); *Naval Courts and Boards* (U. S. Gov't Printing Office, 1937); *American Military Government of Occupied Germany* (U. S. Gov't Printing Office, 1943); Treadwell, *Military Courts Manual* (London, 1945). The Articles of War are found in Title 10, Ch. 36 of the United States Code; Articles



first two function only in territory under military government or martial law, and derive their powers from the so-called laws of war. Courts-martial have jurisdiction over the members of the land and naval forces of the United States, and in time of war over certain civilians. The chief source of their authority lies in Acts of Congress.

#### COURTS OF THE SEVERAL STATES

**Generally.** In each state by constitutional provision and legislative enactment there is established a system of judicial tribunals, which includes various courts of original jurisdiction and one or more of appellate jurisdiction. Usually there is one court of unlimited original jurisdiction which has power to entertain any action regardless of the amount involved or the nature of the relief demanded, though ordinarily it does not have authority over the probate of wills or administration of estates of decedents. And there are generally several inferior courts with jurisdiction limited as to subject matter, amount in controversy or relief sought. These are commonly called by some such name as Town Courts, Municipal Courts, City Courts, Police Courts, Justices of the Peace. Special courts or a special branch of an established inferior court is often set up to handle small claims by an informal procedure. It is also becoming common to have a separate court or a separate part of a court to deal with problems of domestic relations and with juvenile delinquents. In many states there is but one appellate tribunal, a court of last resort; but in some an intermediate tribunal is provided with powers somewhat similar to those of the Circuit Courts of Appeal of the United States. The name of the court does not necessarily indicate its place in the hierarchy of courts. Thus in New York the supreme court is the trial court, and certain divisions of it are intermediate appellate courts while the court of appeals is the court of last resort. In Texas the supreme court is the court of last resort in civil cases and there are a number of intermediate appellate courts called Courts of Civil Appeals. In criminal cases there is no intermediate appellate

for the Government of the Navy in Title 34, Ch. 10, and the provisions for Courts-Martial of the National Guard when not in the service of the United States in Title 32, Ch. 6, secs. 91-97.

court, and the only appeal is to the court of criminal appeals, which is distinct from the supreme court. It would be impracticable to attempt to describe the system of courts in each state. A brief statement as to the more important courts in New York will suffice to give the beginning student a general idea of what he may expect to find in states where there is much litigation.

**New York Courts of Original Jurisdiction.**<sup>89</sup> *The Supreme Court of New York* has original jurisdiction in all actions in law and equity, no matter what the amount involved. The state is divided into districts and a division of the court sits in each district. The Supreme Court in each district sits in so-called Terms, called Trial Terms and Special Terms. In the former, roughly speaking, common law actions are tried; in the latter equity cases, issues of law, various interlocutory motions and special proceedings are heard.

*County Courts.* For each county except New York County a county court has been created. The Constitution confers upon each such court original jurisdiction in actions for the recovery of money only, where all defendants reside in the county and the complaint demands judgment for a sum not exceeding \$3,000. In case a counterclaim for more than \$3,000 is interposed, the action is removable to the supreme court. The legislature has power to enlarge or restrict this jurisdiction subject to the limitation that it may not extend it to include an action for the recovery of money only wherein the sum demanded exceeds \$3,000 or wherein any nonresident of the county is a defendant unless he has an office for the transaction of business within the county and the cause of action arose therein. The legislature has conferred on the county courts extensive jurisdiction in criminal cases and jurisdiction over specified actions in law and equity concerning real property within the county, certain actions affecting the care of the person or property of incompetents within the county and actions for the recovery of money within the prescribed constitutional limits.

*The City Court of New York City* has power to entertain any action at law for the recovery of money where the complaint

<sup>89</sup> For the Courts of New York generally see Constitution of New York, Article VI.

demands judgment for a sum not exceeding \$3,000 and interest; actions of replevin, foreclosure of mechanics liens and liens on personal property where the property involved does not exceed in value the sum of \$3,000,<sup>40</sup> and certain contract actions by persons belonging to merchant vessels and certain tort actions for assault and battery or false imprisonment committed on such vessels, regardless of the amount involved. Its jurisdiction to enter a judgment upon a counterclaim is limited in amount. Its process may be served and its mandates executed only within the territorial limits of the City of New York, but it does have jurisdiction over any defendant who voluntarily appears.

*The Municipal Court of the City of New York* is granted jurisdiction in certain specified actions where the amount involved exclusive of interest and costs does not exceed \$1,000. It has authority to provide systems of conciliation and arbitration and to enter judgment upon awards of arbitrators. It is divided into districts, and actions must be brought in the district wherein one of the plaintiffs or one of the defendants resides. The procedure is simplified.

*Justices' Courts* of strictly limited power exist throughout the state. Civil actions wherein a sum exceeding \$200 is involved are beyond their jurisdiction. The office of justice of the peace is a constitutional town office and cannot be abolished in a town by legislation so long as the town exists.

*The Surrogate's Courts* exercise jurisdiction over the probate of wills, the administration of decedents' estates, the person and property of infants, testamentary trusts and certain other trusts. There is a surrogate of each county in the state.

**New York Courts of Appellate Jurisdiction.** *The Supreme Court* has appellate jurisdiction as well as original jurisdiction. An Appellate Division has been established for each one of the four judicial departments into which the state is divided. It has all the powers of the supreme court and is an appellate court of last resort in some cases, and an intermediate appellate tribunal in others. To it appeal lies from final and interlocutory judgments and from specified orders of the supreme court, and

<sup>40</sup> It has been held that this limitation refers to the amount of the lien, not to the value of the property on which the lien is claimed. *Kaplan v. Antonelli*, 132 Misc. 572, 230 N. Y. Supp. 321 (1928).—

from certain judgments and orders of other courts. In the first two departments the appellate division has a section or branch called the appellate term, with a jurisdiction over appeals prescribed by the appellate division, excluding, however, appeals from the supreme court, a surrogate court or the Court of General Sessions of the County of New York.<sup>41</sup> From the appellate term the appellate division may entertain an appeal.

*The Court of Appeals* is the court of last resort. It may review only questions of law except (a) a judgment of death and (b) a final judgment or final order of an appellate division rendered on new findings of fact made by the appellate division in reversing. In criminal cases there is a direct appeal from a judgment of death entered by a court of original jurisdiction, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide. In civil cases a party may appeal as a matter of right (1) from a final judgment or final order of a court of record of original jurisdiction where the only question on appeal is the validity of a statutory provision of the state or of the United States under the Constitution of the state or of the United States, and (2) from a final judgment or order of an appellate division in which (a) the construction of the Constitution of the state or of the United States is directly involved, or (b) the judgment or order of the appellate division is one of reversal or modification, or (c) there is a dissent by one or more of the judges of the appellate division, or (d) where the appellate division has granted a new trial and the appellant stipulates that, upon affirmance, judgment absolute may be granted against him. From other final orders or judgments of an appellate division an appeal is allowed by permission of the appellate division or of the court of appeals.

<sup>41</sup> This court is a court of record having original jurisdiction of criminal actions in New York County. The County Court of New York County, unlike other county courts, does not have such jurisdiction. N. Y. Judiciary Law § 2, Code Cr. Proc. § 11.

## CHAPTER II

### NATURE AND SOURCES OF LAW

**Legislation.** If the law consists of the rules administered by the courts, it is pertinent to inquire whence the courts derive them. One of the sources is legislation. Theoretically, legislation may be enacted either directly by the members of the community or through their representatives; practically it is and always has been enacted by the latter, for universal participation in the framing or approval of statutes is impossible. Those who have and exercise the privilege of constructing a form of government for any jurisdiction may provide for a representative body with unlimited power of legislation, like the English Parliament, or for a body with strictly limited authority, like the Congress of the United States or the legislatures of all our states.<sup>1</sup> The legislative sources to which an American court may resort are (1) the Constitution of the United States; (2) Acts of Congress and Treaties made within the authority of the Constitution and regulations made by various subordinate agencies and tribunals pursuant to authority duly granted by valid provisions of Acts of Congress; (3) the Constitution of any state in so far as not repugnant to the United States Constitution, the Acts of Congress or Treaties; (4) the enactments of the legislature of any state not repugnant to the Constitution of the United States, the Acts of Congress, Treaties, or the Constitution of that state; (5) the enactments of any subordinate legislative body made within the scope of the powers duly delegated to it. Legislative enactments usually require interpretation. For the purposes of litigation, a constitutional or statutory provision pertinent to a particular case means what the court declares it to mean. The courts under the Anglo-American system are the final interpreters of legislative pro-

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<sup>1</sup>Of course, the limitations upon Congress are different from those upon the state legislatures, for Congress has no powers not granted to it by the United States Constitution, while the state constitutions are not grants of power but documents of restriction.

visions applicable or claimed to be applicable in specific litigated situations.

**Common Law.** When a court, other than a court of admiralty or of equity or a military tribunal, is confronted with a problem which cannot be solved by reference to pertinent legislation, it is ordinarily said that it must make its decision according to the common law. The common law of England is usually defined as consisting of those principles, maxims, usages, and rules of action which are based upon immemorial custom and are enforced by its courts. Some of them may have originated in unrecorded, lost or destroyed legislative acts. The common law of any American jurisdiction is generally considered as made up of the English common law, with such modifications as are required by the different circumstances and conditions therein existing and certain English statutes in force prior to the Revolution.<sup>2</sup> It is to be noted that the common law is not a body of

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<sup>2</sup> "A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this 'the common law of England,' because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

"In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law. . . . Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts." Shaw, C. J., in *Commonwealth v. Chapman* (1847), 13 Metc. (Mass.) 68.

"For though the common law of England hath not, *as such*, nor ever had any force here; yet, in the progress of our affairs, whatever was imagined at the beginning, it long since became necessary, in order to avoid arbitrary decisions, and for the sake of *rules*, which habit had rendered familiar, as well as the wisdom of the ages matured, to make that law our own, by practical *adoption*—with such exceptions as a diversity of circumstances, and the incipient customs, of our own country, required. The same may be said of ancient English statutes,

rules universally and automatically applicable like the law of gravitation, but owes its power and its very existence to an

not penal, whose corrective and equitable principles had become so interwoven with the common law, as to be scarcely distinguishable therefrom." *Fitch v. Brainerd* (1805), 2 Day (Conn.) 163, 189.

Pound, *What Is the Common Law*, 4 U. of Chi. L. Rev. 176, 181, 186 (1937): "From one standpoint we may think of the common law as a system—as an organized body of doctrines and principles, and even to some extent still of rules for the adjustment of relations and ordering of conduct. From another standpoint we may think of it as a tradition—either as a tradition of deciding, so far as tribunals are free to decide, or as a tradition of teaching and writing. From yet another standpoint we may think of it as a frame of mind—as the frame of mind, or perhaps better as a manifestation of the frame of mind, of a masterful people which has made its way in every quarter of the earth and yet has always imposed upon itself limitations of free action while still seeking to be free through requiring reasoned adherence to principles on the part of those who wield governmental authority over it.

"In speaking of the common law as a system, I have spoken in terms of a system of authoritative grounds of decision which yield precepts for adjustment of relations and ordering of conduct. I am not unaware that for the moment it is more fashionable to speak of law as a body of predictions or as a body of threats. But I submit that the law is not made up of predictions. Instead it is made up of bases of prediction. Moreover, what from the standpoint of one seeking advice as to the conduct of an enterprise may be regarded as a body of threats, from the standpoint of the judge is a body of precepts for decision getting its aspect of threat from the assured conviction that the several precepts will be applied to causes as they arise and so entail inconvenient consequences upon those who ignore them. . . .

"No less characteristic and universal in the common-law world is our technique of decision; our technique of finding the grounds of decision in the authoritative legal materials, of shaping legal precepts to meet new situations, of developing principles to meet new cases, and of working out from the whole body of authoritative materials the precepts appropriate to a concrete situation here and now. . . .

"If we think of the common law as a taught tradition of decision, it is a tradition of applying judicial experience to the decision of controversies. If we think of it as a tradition of teaching and writing, it is one of teaching a systematic application of this technique and writing systematic expositions of the results of its application. Moreover, it is a tradition which has its roots in the Middle Ages and so was shaped in its beginnings as a quest for reconciling authority with

organized government. As Mr. Justice Holmes has put it: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . . It is always the law of some state."<sup>3</sup>

The materials which the court will first examine in its search for the rule to be applied are prior judicial decisions. If it finds

reason, imposed rule with customs of human conduct, and so the universal with the concrete.

"I have spoken of the common law, in the sense of the universal and enduring element in the law of the different English-speaking peoples, as from one point of view a frame of mind. For behind the characteristic doctrines and ideas and technique of the common-law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally, as like as not by one who had never conceived of the problem by which the tribunal is confronted. It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas. It is noteworthy that there are signs of a movement toward this concrete mode of thought in recent juristic writing on the Continent."

The term, common law, is often used to differentiate the Anglo-American system from other systems, e. g., from the civil law which prevails on the continent of Europe. It is also frequently applied to designate the rules applied by the courts of common law as distinguished from the rules applied by courts of equity.

<sup>3</sup> *Southern Pacific Co. v. Jensen* (1917), 244 U. S. 205, 222. This idea has not, however, met universal acceptance. For example, in *St. Nicholas Bank v. State National Bank*, 128 N. Y. 26, the defendant claimed that a certain contract was governed by the common law of Tennessee. To this Mr. Justice Earl replied: "There is no common law peculiar to Tennessee. But the common law there is the same as that which prevails here and elsewhere, and the judicial expositions of the common law there do not bind the courts here." And in *Slaton v. Hall*, 168 Ga. 710, 716 (1929), the court said: "Though courts in the different States may place a different construction upon a principle of common law, that does not change the law. There is still only one right construction. If all the American States were to construe the same principle of common law incorrectly, the common law would be unchanged."



an applicable precedent, it will ordinarily determine the controversy accordingly; if it can find no previous adjudication on all fours with the case in hand, it will try to ascertain whether any available decisions have sufficient elements in common with it to require or justify an application of the rule used therein. If it finds a precedent squarely in point or applicable by analogy, but determines nevertheless that it ought not to be followed, or if it finds no pertinent precedent, it ought to, and generally will, decide the case as it believes a proper consideration of history, custom, morals, and sound social policy requires. Obviously in this process it does and must resort not only to judicial decisions of noncommon-law courts but also to nonlegal materials; it gives due weight, in so far as it is able, to the known truths of all the sciences affecting human experience and human conduct. The resort to nonlegal materials is not confined to the solution of common-law problems; it is made, though perhaps to a less degree, in the interpretation and application of statutes.<sup>4</sup>

**Equity.** The jurisdictions of this country which adopted the English common law adopted also the English equity system; and the nonstatutory rules administered by Courts of Equity are included in the term common law as ordinarily used. Originally, here as in England, the courts which administered these rules of equity and good conscience were separate tribunals. Later the same court sat at times to hear common law cases and at other times to try suits in equity. The distinctions, however, between the two classes of cases as to practice, procedure and jurisdiction remained. If a litigant brought his case in equity when he ought to have sued at common law, his case was dismissed, and he had the privilege of beginning his action at common law before the same court. Under most modern codes and under the Federal Rules of Civil Procedure the distinction between actions at law and suits in equity is abolished; and a litigant is not ordinarily turned out of court merely because he has sought equitable relief where he should have asked for legal relief. In jurisdictions where the distinction persists, it is now provided that a case which is brought on the wrong side of the

<sup>4</sup> See Cardozo, *The Nature of the Judicial Process*.

court may be transferred to the other without undue delay or expense.

In seeking a proper rule for any pending cause the court having to decide an equitable issue proceeds in the same manner as a court of common law. Applicable statutes are controlling; prior judicial decisions of equitable tribunals come next, but all the other materials usable by any judicial body may be considered and given due weight.

**Admiralty.** The rules governing maritime causes have their foundation in "the ancient laws, customs and usages of the seas." The judicial power of the United States comprehends all cases of admiralty and maritime jurisdiction. When a United States court is trying a cause in admiralty, not only is its procedure different, but the substantive rules may also vary greatly from those which would be applied by the same court in a non-maritime cause involving the same facts. Of course, pertinent valid legislation, prior judicial decisions in admiralty, other legal materials and the known truths of the sciences affecting human experience and human conduct are operative here in influencing the court's determination of the rule which is to be employed to solve the problem presented, in the same manner as they are operative with courts handling a common-law controversy or an equitable issue. The only diversity is that the applicable statutes, precedents and known truths will probably be different.

**Law Merchant.** The rules administered by courts of common law, equity and admiralty are binding upon all members of the community without distinction. The nature of the dispute or of the relief demanded determines which court has jurisdiction. The customs and usages of the sea originally applied in admiralty were in large part the customs and usages of marine merchants; and as early as the thirteenth century it was recognized in England that all mercantile transactions, maritime and nonmaritime, were governed by a body of rules inapplicable to nonmercantile matters. The nonmaritime law merchant had a marked effect upon the development of the common law, and many of its rules were adopted *in toto* by the common-law

courts; but it did not succeed in becoming an independent branch or department of jurisprudence; nor were its provisions ever regarded either in England or in America as law for a particular class of persons as distinguished from a class of controversies or transactions.<sup>5</sup>

**Canon Law.** The rules which the ecclesiastical courts in England in the Middle Ages applied in the causes over which they exercised jurisdiction had a considerable influence in shaping the Anglo-American law of marriage, divorce, legitimacy and administration of decedents' estates. To that extent the canon law is one of the sources of our law of today. But no system of canon law has ever prevailed in the United States wherein a churchman could successfully claim not to be subject to the law of the land.

**Military Law.** The 1920 edition of the Manual for Courts-Martial for the Army declares military law to be:

" . . . The legal system that regulates the government of the military establishment. It is a branch of the municipal law, and in the United States derives its existence from special constitutional grants of power. It is both written and unwritten. The sources of written military law are the Articles of War enacted by Congress June 4, 1920; other statutory enactments relating to the military service; the Army Regulations; this official Manual for Courts-Martial; and general and special orders and decisions promulgated by the War Department and by area, department, post, and other commanders. The unwritten military law is the 'custom of war,' consisting of customs of the service, both in peace and war."<sup>6</sup>

Winthrop says that "Military law proper is that branch of the public law which is enacted or ordained for the government exclusively of the military state, and is operative equally in peace and in war."<sup>7</sup>

<sup>5</sup> 1 Pollock and Maitland, *History of English Law* (2 ed. 1905), 466-467.

<sup>6</sup> War Dept., Document No. 1053, Government Printing Office, 1920.

<sup>7</sup> Winthrop's *Military Law and Precedents* (2 ed. 1896) 4.

The rules applicable to the naval forces should be included. The sources of this branch of written military law are the Articles for the Government of the Navy, other statutory enactments relating to the naval service, navy regulations and instructions issued by the Secretary of the Navy, including General Orders, Uniform Regulations, Signal and Drill Books and Naval Courts and Boards.

The sources from which the unwritten military law may be deduced are decisions of the Courts of the United States, decisions of Courts-Martial, and opinions of the Judge Advocate General of the Army, of the Judge Advocate General of the Navy and of the Attorney-General.<sup>8</sup> Courts-martial like other judicial tribunals are frequently confronted with questions not soluble by statute or prior adjudication. In such cases they must and do act in much the same manner as other courts.

**Law and Morals.**<sup>9</sup> It is important to bear in mind that the law furnishes only part of the sanctions which influence the conduct of members of an organized society. Many men who would give no thought to legal consequences are deterred from a given course of behavior by their religious convictions or their conceptions of ethics or their notions of etiquette or the written or unwritten codes of conduct of their associates in business, their clubs or their trade organizations. This is no place to discuss the much debated relationship between law and ethics or law and morals or the effects of one upon the other. If it be granted that "Ethics aims at perfecting the individual character," "Morals look to thought and feeling,"<sup>10</sup> and ethics attempts "to discover those rules which should be followed because they are good in themselves,"<sup>11</sup> while the "law looks to acts . . . seeks only to regulate the relations of individuals with each other and with the state,"<sup>12</sup> then it must be clear that the area covered by law is not coextensive with that governed

<sup>8</sup> See footnote 38, ch. 1.

<sup>9</sup> See Ames, *Lectures on Legal History*, 435-452; 310-322. Pound, *Law and Morals*; Pollock, *First Book of Jurisprudence* (5 ed.), 46-54; 1 Pollock and Maitland, *History of English Law* (2 ed.), xxv-xxvi; Paton, *A Text-Book of Jurisprudence* 57-61.

<sup>10</sup> Pound, *Outline of Lectures on Jurisprudence* (5 ed., 1943) 83, 82.

<sup>11</sup> Paton, *A Text-Book of Jurisprudence*, 57.

<sup>12</sup> Pound, *Outline of Jurisprudence* (5 ed., 1943) 82, 83.

by ethics and morals. Courts will be found formulating and applying rules that have little or no basis in ethics or morals; they may, for example, have to determine which of two equally blameless persons will have to bear a loss, they may impose liability upon one who has been guilty of no fault or refuse to penalize conduct obnoxious even to the morally obtuse.

It would be difficult, if not impossible, to discover a principle of ethics determinative of the content of the rules of the road. Wherever a highway is much travelled, some regulations are necessary to prevent confusion and accident. But ethics is not concerned whether the traveller shall pass oncoming traffic upon the right or left, or whether he who approaches an intersection of highways from the right shall have the right of way over him who approaches from the left, or *vice versa*. After the rules are once established, a proper sense of morals may require all travellers to know and obey them, but morals has nothing to say as to what the rules shall approve or denounce. Again suppose that C steals A's chattel and sells it to B, whose conduct in purchasing it is quite beyond reproach; or that C by fraud induces A to sell A's chattel to C and C then sells it to B, who buys in good faith. In a controversy between A and B, the courts must place the loss caused by C's misconduct upon one of two morally innocent persons. How can ethics or morals be of appreciable assistance in solving this problem? As a matter of fact, the courts favor A in the first case and B in the second, but on what ethical grounds can the cases be distinguished?

There are, however, situations where the currently accepted standards of ethics are deliberately disregarded by the law. A person who has exercised the greatest care that human foresight could conceive to prevent harm to another may nevertheless have to answer for such harm. The example which will immediately suggest itself is the common law rule which makes a master responsible for injury done by his servant in the scope of his employment regardless of the care which the master used in selecting the servant, in giving him adequate instructions, and in furnishing him proper instrumentalities. Perhaps the various workmen's compensation acts may be cited as another instance, for they impose liability without fault; but it may well be said that these merely require of the employer a standard of conduct which prevailing moral notions demand in the light of existing social and economic conditions. On the other hand it sometimes

happens that for practical reasons the courts decline to enforce the most elementary precepts of ethics and morals. To refuse to perform a promise deliberately made, without the slightest change in circumstances and without the shadow of excuse for the refusal, is unquestionably bad morals; but unless the promisor has received a consideration or attached his seal to the promise, the common law ordinarily leaves him free to break it. A person who saw an infant helplessly struggling in a shallow pool and who could easily have effected a rescue but deliberately refused to attempt it would be deemed unfit to associate with decent people, but, generally speaking, would be legally blameless. No one is as yet legally bound to play the Good Samaritan. "Thou shalt not bear false witness" is a command of religion and ethics, and yet the courts tell us that a judge, in the course of his official duty, may with impunity utter the following false and malicious slander concerning the plaintiff: "It is our opinion that this has been a gross attempt to blackmail. From what we have heard of this man, he has been in the habit of trying to extort money from persons by illegal means, and if he found himself in gaol for twelve months, it would possibly do him a good deal of good."<sup>13</sup> For one robed in the authority of high judicial office to decide a case corruptly in order to satisfy his malice against one of the parties is to sin against the most obvious requirements of common decency, to say nothing of the principles of ethics. But the Supreme Court of Tennessee, following respectable precedents, held a judge not legally responsible to plaintiff against whom he "corruptly, maliciously, wickedly and oppressively" decided a disbarment proceeding.<sup>14</sup> Religion and morals may denounce covetousness, but the law encourages competition none the less where the competitor is motivated by covetousness of his neighbor's profits. In all these cases, and in many more that might readily be suggested, the courts refuse to give the injured person relief, not because they approve the conduct of the wrongdoer or do not appreciate the injustice done the injured party, but because considerations of expediency and policy make it impracticable to enforce in such circumstances the standards of conduct which religion, ethics or morals may demand.

<sup>13</sup> *Law v. Llewellyn*, [1906] 1 K. B. 487.

<sup>14</sup> (1902) *Webb v. Fisher*, 109 Tenn. 701.

## CHAPTER III

### MAIN TOPICS OF THE LAW

**Divisions for Convenience.** It has been frequently observed that the law is an indivisible unit. No part of it can be adequately appreciated except in its proper relation to the whole. Yet the subject is of so vast a content that for purposes of study it must be separated into divisions.<sup>1</sup> These must be more or less arbitrarily made, and they will of necessity gradually blend into each other. From one standpoint it might well be advantageous to consider the substantive law separately from the procedural or adjective law. Under the former would be studied those rules which declare the legal relations of litigants when the courts have been properly moved to action upon facts duly presented to them; under the latter, the means and methods of setting the courts in motion, making the facts known to them and effectuating their judgments. Still these grand divisions are too large for close examination, and further subdivision is required. The substantive law is often treated under three main topics, Contracts, Crimes and Torts.

**Contracts.** Among the rules which the courts of a society that has reached a comparatively advanced stage of civilization are called upon to declare and administer, are those having to do with the enforceability and enforcement of promises. Such promises as the courts hold to be enforceable are termed contracts. And the law of contracts consists in general of those rules which define what conduct, verbal or nonverbal, amounts to a promise, what circumstances must attend a promise to make it enforceable, what facts operate to justify or excuse nonperformance or to discharge the promise, and what relief, if any, is to be given to persons injured by nonperformance.

**Crimes.** Every member of an organized society owes to the state, that is, to all the other members in their aggregate capac-

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<sup>1</sup> Bishop, *Non-Contract Law*, 1; Pollock, *First Book of Jurisprudence* (5 ed.), 84.

ity, a duty to conform to such regulations as are prescribed by the state for its welfare as a state, as distinguished from the regulations prescribed for the welfare of the individual members as such. A violation of that duty constitutes a crime, and the violator is subject to punishment in a proceeding by the state. The law of crimes, or criminal law is composed of such regulations and of the rules which declare and delimit such duty, define the acts and omissions constituting its violation, and fix the penalties therefor. It would be easy to pick flaws in the foregoing statements were they offered as precisely correct definitions. But they are sufficiently exact to furnish a working idea of the scope of this field of the law.

✓ **Torts.** To frame a nicely accurate definition of a tort, too, would be an unprofitable, if not impossible task. It has been attempted by many commentators and text writers with indifferent success. Professor Wigmore would wish the term out of existence:

“Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract. As if a man were to define Chemistry by pointing out that it is not Physics nor Mathematics!”<sup>2</sup>

But for purposes of discrimination it may be helpful to know what a thing is not; and a consideration of several standard definitions may give a practical notion of the characteristics of a tort and of the features which distinguish it from a crime or breach of contract. Salmond says:

“We may accordingly define a tort as a civil wrong for which the remedy is an action for damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.”<sup>3</sup>

Bishop phrases it thus:

“The word ‘tort’ means nearly the same thing as the expression ‘civil wrong.’ It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more

<sup>2</sup> Wigmore, *Select Cases on the Law of Torts*, VII.

<sup>3</sup> Salmond, *Law of Torts* (6 ed.), 7.



nicely accurate, a tort is one's disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract had established between the parties."<sup>4</sup>

Professor Burdick has offered the following:

"A tort is an act or omission which unlawfully violates a person's right created by the law, and for which the appropriate remedy is a common law action for damages by the injured person."<sup>5</sup>

**Comparisons.** Some attributes a tort has in common with a breach of contract. The duty violated in both cases is one owed to an individual as such and not to the state; in both the relief obtained may consist of damages; in both the remedy is an action brought by the injured party. But in contract the duty comes into existence only when the duty-bearer has voluntarily undertaken to assume it; the duty is merely to perform a promise. So, roughly speaking, it is sometimes said that the duty is created by the acts of the parties. What is meant is, that when a person's conduct amounts to what society through its properly constituted agencies declares to be an enforceable promise, society lays on him the duty to fulfill that promise. In tort, on the other hand, the duty is put upon the individual member of the community often merely because he is such member, and usually, if not always, regardless of whether he has voluntarily undertaken to assume it. It may be that the particular duty is imposed only because the duty-bearer has brought himself into a particular consensual relationship with another or others, for example, that of carrier and passenger, or of landlord and tenant. But the duty, violation of which is named a tort, is not merely that of fulfilling a promise made to that other or those others. And that is what Professor Burdick means when he says that the right infringed by a tort is "created by law." The characteristics which the tort and the breach of contract have in common distinguish each of them from the crime. The duty violated by a crime is one owed, not to an individual member of society as such but to the state; no relief is obtained by the

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<sup>4</sup> Bishop, *Non-Contract Law*, 3.

<sup>5</sup> Burdick, *Torts* (3 ed.), 12.

injured party, and the wrongdoer is pursued, not in an action by the wronged, but in a proceeding instituted and prosecuted by and in the name of the state, the object of which is the punishment of the wrongdoer. But as in the case of the tort, the duty is imposed without regard to the will of the duty-bearer.

**Examples.** The same act or omission may or may not constitute both a tort and a crime according to the circumstances of the particular case. For example, if A while hurrying along the public street, carelessly but unintentionally collides with B, and injures him, A invades B's private right to personal immunity, but he does no wrong to the state as such: he commits a tort but not a crime. If A is merely drunk and disorderly on a public street, or if A in the seclusion of his home intentionally maims himself, he violates his duty to conform to a regulation prescribed by the state for its welfare as such, although he does not infringe the right of any individual as an individual: he commits a crime but not a tort. But if A intentionally beats B upon the public street or if he intentionally maims B, he not only transgresses his duty not to interfere with B's person but he is also guilty of an infraction of a rule established by the state for its welfare as a state. He is subject to a civil action for damages by B and to a criminal prosecution by the state. Against B as an individual he commits a tort; against the state he commits a crime. Similarly the same act or omission may or may not be a tort and a breach of contract, or a tort, a crime and a breach of contract. If B has his chattel stored in a warehouse, and A, by acting as a reasonably prudent man would not act, injures that chattel, he violates his duty not to interfere unjustifiably with B's property, and commits a tort. If A, in consideration of a sum of money to him paid by B, promises B to guard and protect that chattel from injury and theft, and as before negligently injures it, he commits a tort as before, but he also breaks an enforceable promise and is guilty of a breach of contract. If after making the promise A steals the chattel, he breaks his contract as before; he also violates B's right to have his property free from unjustifiable interference, and he transgresses a duty owed by him to the state as such. His single act constitutes a breach of contract, a tort and a crime.

**Quasi-Contract.** Furthermore there are certain noncontractual duties for the violation of which redress is given in the form of action usually reserved for contracts. They are imposed by law in the sense that the consent or lack of consent of the duty-bearer to their creation is entirely immaterial. The wrong done by the transgression of such a duty would fit Professor Burdick's definition of a tort, but it is usually classified as a breach of quasi-contract, and in some instances the operative facts constituting the breach of duty would not support a tort action. Suppose that, after due process of law, B recovers a judgment against A upon a claim which A has from the beginning vigorously resisted; suppose further that A has consistently declared that he would never pay the claim or any judgment founded upon it. A still refuses to pay. Now clearly A has not interfered with B's person or property in any way; he has made and broken no promise to B; he has not violated a rule laid down by the state for its protection as a state. But just as clearly he is refusing to perform a duty to B which society through its duly authorized agent, the court rendering the judgment, has imposed upon him. If the entire field of law is occupied by Contracts, Crimes and Torts, the definition of one of these divisions must be so framed as to include this case; or a remedy may be provided for this breach of duty as if it did belong in one of these fields. The latter alternative has been chosen. B may bring his action and allege that A promised to pay the judgment. Of course he can never support this allegation by proof, but the courts have said that he need not so support it, because the promise will be implied. What they mean is that the duty is imposed upon A regardless of any intention, desire or promise on his part, and that B may have the same remedy as if A had promised; the duty is quasi-contractual, as if created by contract. Again, take the following case. A, falsely pretending to act as P's agent, collected from D a sum of money which D owed to P, and refused to pay it over to P or to return it to D. When A got the money from D, he committed a tort against D because D had the right not to have his money taken from him by such a fraud; as against the state in most jurisdictions A was guilty of a crime. But as against P, A cannot be said to have committed a tort; he made no misrepresentation to P and in no way interfered with his person or property. Nor did he break

any promise to P. Conceivably P should have no cause of action against A. Yet it is well settled that P may bring his action alleging that A promised P to pay the money over to P, and may succeed in the action without any proof of the promise. Here again A's duty to P is quasi-contractual. These two examples are sufficient to show that certain conduct may be a breach of a quasi-contract only, and that certain other conduct may, according to the aspect in which it is regarded, constitute a crime, a tort and a breach of quasi-contract. If to the facts in the second case is added an express promise by A to D to pay the money over to P, A's conduct would also be a breach of contract.

**Further Subdivisions.** The foregoing discussion has demonstrated the truth of Bishop's statement that the law is a partitionless whole, and that its division into subjects is useful only for convenience in study. And during the study of a particular topic the student must never forget that the total operative effect of any fact upon the legal relations of any person involved cannot be determined without a survey of the entire field. The division of the field of law into Contracts, Crimes, Torts and Quasi-Contracts is not sufficient for intelligent intensive study, and often it is advisable to make divisions which cut across two or more of these major divisions. For example, the average law school curriculum has long offered not only fundamental courses in Contracts, Crimes and Torts; it has also provided for a study of special forms of Contract in courses on Sales, Negotiable Instruments, Suretyship, and Mortgages. The law of torts, contracts and quasi-contracts as applied to Property, Public Service Companies, Corporations, Partnership, and Agency is usually considered in separate courses. The effects given by the law to certain relationships, most of them having their inception in contract, are ordinarily treated in courses on Public Service Companies, Agency, Partnership, Corporations, and Domestic Relations. Attention to rules governing procedure in the courts is given in courses on Pleading, Practice and Evidence; and those rules which were applied in the courts of equity as distinguished from the courts of common law form the subject matter of courses in Equity and Trusts. More recently the laws governing taxation, relations between employers and labor unions, and the

powers, duties, and procedure of administrative tribunals have become so complex and so important as to require detailed study in separate courses. Separate treatment is also given to constitutional law, the interpretation of statutes, and at times the drafting of legislation. New arrangements of subject matter based on theories of practical operation of the pertinent rules in business and on modern theories of pedagogy have been tried in some schools. Indeed the extent to which and manner in which the subdivision of the field may be carried depends upon the thoroughness and intensity with which any specified aspect of a subject or subjects is to be studied.

## CHAPTER IV

### PROCEDURE

The law student devotes a major portion of his attention to the rules which declare the legal relations of litigants when all relevant facts are known or assumed. If he is to know how these rules are made to operate in practice, he must inquire in what manner a controversy is brought to the attention of the courts, how questions of law are raised and determined, how the facts are made known; in short, by what procedure the courts are moved to action. To answer these queries in detail would require volumes. It must suffice to indicate briefly what takes place in a lawsuit and how the court comes to deliver the opinion in which it sets forth its reason for its adjudication. But at least so much is necessary as a basis for an intelligent reading and a proper evaluation of the report of a judicial decision.

**Beginning the Action.** Suppose that Samuel Student and Peter Policeman have been engaged in an altercation. Student asserts that while he was peaceably walking along the street, Policeman without cause struck him with a club and severely injured him. He retains Lewis Lawyer to bring action against Policeman. After making as thorough an investigation as practicable, Lawyer is of the opinion that Policeman was at fault and ought to respond in damages. If this had happened under the old common law system in England, Lawyer's first task would have been to determine what writ and form of action would afford the proper remedy. In the next chapter the scope of the various forms of action and the importance of selecting the correct form are explained. Suffice it to say now that in this instance Lawyer would have gone or have had Student go to the Chancery Office for a writ in Trespass, which would have issued in substantially the following form:

“The King to the Sheriff, greeting: If Samuel Student shall make you secure for prosecuting his claim, then put by safe gages and pledges Peter Policeman that he be before

us on the Morrow of All Souls wheresoever we shall be in England to show cause why with force and arms he made an assault upon the said Samuel Student at N and beat, wounded and illtreated him so that his life was despaired of and other enormities to him did to the great damage of him the said Samuel Student and against our peace. And have there the names of the pledges and this writ. Witness, etc." <sup>1</sup>

The sheriff would have summoned the defendant Policeman as commanded in the writ. On the designated day Policeman, let it be supposed, would have appeared and Student would have been there too. In earlier times these appearances would have been actually made in open court; and, as is explained in Chapter VI, the parties by oral pleading would have reached an issue. In later times the appearances would have been made by serving or filing written statements of appearance, and each pleading would have been written and would have been served or filed at prescribed periods of time.

**Beginning the Action in a United States District Court.** If the plaintiff is a nonresident of the state in which he brings his action and his claim is for more than \$3,000, he may bring it against the resident defendant in the local United States District Court. He begins by filing a complaint in the court. Thereupon the clerk forthwith issues a summons and delivers it for service to the marshal or to a person specially appointed to serve it. The summons will read:

District Court of the United States for the  
Southern District of New York

Samuel Student, Plaintiff	}	Summons
v.		
Peter Policeman, Defendant		

To the above-named Defendant:

You are hereby summoned and required to serve upon  
Lewis Lawyer, plaintiff's attorney, whose address is 24

<sup>1</sup> See Maitland, *Equity and the Forms of Action at Common Law* (1909), 383.

Broadway, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated Sept. 1, 1947.

(Seal of United States District Court)

John Clark  
Clerk of Court.

The complaint should contain this allegation:

Plaintiff is a citizen of Connecticut and defendant is a citizen of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

The remainder of the complaint may be substantially the same as that set out below for the action in New York. The summons and the complaint will be served together as provided in Rule 4, Federal Rules of Civil Procedure.

**Beginning the Action in New York.** If this controversy occurs in New York to-day, Lawyer may start his action without any application to any court or official. He will first make out a summons in the following form:

Supreme Court of New York,  
County of New York.

Samuel Student, Plaintiff,	{	Summons
against		
Peter Policeman, Defendant.		

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or



answer, judgment will be taken against you by default for the relief demanded in the complaint.<sup>2</sup>

LEWIS LAWYER,  
Attorney for Plaintiff,  
24 Broadway,  
Borough of Manhattan,  
New York City.

He will cause this summons to be served upon the defendant, Policeman, by the sheriff or some indifferent person, who will make the service by handing to and leaving with Policeman a correct copy thereof.<sup>3</sup> The complaint may, but need not, be attached to and served with the summons. If not so attached, the defendant may procure a copy of it by serving on plaintiff's attorney a notice of appearance and a demand for such copy. The complaint will read substantially as follows:

(Title as in the Summons, with "Complaint" substituted for "Summons.")

Comes now the plaintiff in the above-entitled action and for cause of action against defendant complains and alleges:

1. On January 1, 1947, the above-named defendant in the City and County of New York assaulted and beat the plaintiff, and with a stick and with his fists gave and struck the plaintiff a great many violent blows and strokes on and about his head, arms and body, and thereby broke plaintiff's right arm above the elbow and fractured plaintiff's skull.

2. By reason of the injuries so inflicted upon plaintiff by defendant, plaintiff suffered great bodily and mental anguish, and became permanently disabled and crippled for life, to his damage in the sum of \$10,000.

3. Prior to the infliction of said injuries plaintiff was employed as an instructor in the X Y Tutoring School and was receiving a salary of \$200 per month.

4. By reason of the injuries so inflicted upon plaintiff by defendant plaintiff was unable to attend to his busi-

<sup>2</sup> New York Civil Practice Rule 45.

<sup>3</sup> This is the usual personal service. Provision is made for substituted service in specified situations.

ness as tutor for a period of six months, and necessarily paid out for medical and surgical services the sum of \$600.

Wherefore plaintiff prays judgment against defendant in the sum of \$11,800, together with his costs and disbursements herein.

**Beginning the Action in Connecticut.** If the action is to be brought in Connecticut, the plaintiff or his attorney will apply for a writ of Summons to a justice of the peace, a commissioner of the Superior Court (and all duly licensed attorneys are such commissioners) or a judge or clerk of the court to which the writ is to be returnable. His attorney will in practice have the writ all ready for signature, and it will be in the following form:

To the Sheriff of the County of New Haven, his deputy, or either constable of the Town of New Haven in said county, greeting:

By authority of the State of Connecticut, you are hereby commanded to summon Peter Policeman of the City and County of New Haven to appear before the Superior Court to be holden at the City of New Haven within and for the County of New Haven, on the first Tuesday of March A. D. 1947, at 10 o'clock in the forenoon, then and there to answer unto Samuel Student of the City and County of New Haven in a civil action, wherein the plaintiff complains and says:

1. On January 1, 1947, the defendant assaulted the plaintiff and beat him with a cane and with his fists.
2. The plaintiff was then a tutor, receiving a salary of \$200 per month.
3. Said battery broke plaintiff's right arm above the elbow and fractured his skull, and he was thereby disabled from attending to his business for six months thereafter and compelled to pay \$600 for medicines and medical care and attention.

The plaintiff claims \$11,800 damages.

I, John Williams, the subscribing authority, hereby certify that I have personal knowledge as to the financial responsibility of the plaintiff, and deem it sufficient.

Of this writ with your doings thereon make due return.  
John Williams, Justice of the Peace.

The sheriff or constable will serve the writ by leaving an attested copy of it with defendant or at his usual abode.

**Beginning the Action in Some Other Jurisdictions.** In some jurisdictions the action is begun by filing with the Clerk of the Court a Praeipe for a Summons, in some others by filing the complaint and a Praeipe for a Summons. The Praeipe will usually be entitled with the name of the court and county, and with the names of the parties, as in the sample summons used in New York, set out above, and will be signed by the plaintiff or his attorney. The body of it will be substantially as follows:

“The clerk of the District Court will please issue summons in the above-entitled action returnable according to law.”

or

“The clerk of the said court will issue a summons in the above-entitled action directed to the sheriff of the County of X, and returnable to the October term 1947.”

The clerk of the court will issue a summons according to the request in the Praeipe, and the proper officer will serve it upon the defendant.

**Raising and Deciding an Issue of Law.** When Policeman is served with the summons, if he is wise, he will retain an attorney. Let it be assumed that he employs Arthur Andrew. Andrew's first task will be to examine the declaration or complaint. If it has not been served with the summons but is on file in the office of the clerk of the court, he may inspect it there and make a copy of it; if not on file, he may secure a copy from plaintiff's attorney. If after scrutinizing the complaint he is convinced that the facts alleged therein disclose no legal claim against Policeman, he may desire to challenge its sufficiency. He will have to make an appearance for Policeman. In some jurisdictions this is done by filing with the clerk of the court a statement that Peter Policeman appears by his attorney, Arthur Andrew; in others, by delivering to plaintiff's attorney a notice of such

appearance or by serving on him a pleading in response to the complaint. In attacking the complaint, at common law and under most codes, he will interpose a demurrer. (See Chapter VI.) In New York and a few other jurisdictions he will make a motion for judgment dismissing the complaint on the ground that it does not state facts sufficient to constitute a cause of action. In a United States District Court he may make such a motion on the ground that the complaint fails to state a claim upon which relief can be granted.<sup>4</sup> The demurrer or motion will be brought on for argument before the court without a jury. The court will hear argument upon the question whether, assuming all the facts stated in plaintiff's complaint to be true, defendant has committed any wrong against plaintiff for which the law will give him redress in this action. But it will receive no testimony at all; the decision must be made upon the allegations of the complaint alone. If the court holds plaintiff's pleading insufficient, it will order judgment for defendant unless plaintiff prays and gets leave to amend: if it holds the pleading sufficient, it will order judgment for plaintiff unless defendant prays and gets leave to interpose a plea or answer. Under modern codes it is often provided that the order for judgment must contain such leave. Sometimes, but not often, the court in making its decision will render an opinion which will be printed in the regular law reports. If no amendment is made or plea interposed, judgment will be entered according to the order, unless by the local practice the order is appealable, and an appeal therefrom is perfected.

**Raising an Issue of Fact.** If Andrew determines that the complaint does require an answer on the facts, he will ascertain from Policeman his version of the occurrence. Let it be assumed that Policeman denies that he struck Student. After making an appearance for Policeman in the manner required by the local rules of practice, he will put in a plea of general issue or an answer of general denial (see Chapter VI), and thus raise an issue of fact for trial by a jury.<sup>5</sup>

<sup>4</sup> He need not make such a motion in the United States District Court but may set out this ground as a defense in his answer.

<sup>5</sup> The plaintiff may attack defendant's answer for insufficiency in law by a procedure similar to that by which defendant may attack plaintiff's complaint.

**Bringing Issue of Fact on for Trial by Jury.** It might be supposed that after the issue between Student and Policeman has thus been made by the pleadings, it would automatically come before the court and jury for trial. But not so. In most jurisdictions it might forever lie undetermined in the absence of further action by one of the parties. Courts hold series of sessions, known as terms, periodically. If Student's case is pending in the New York Supreme Court and he wants it tried, his attorney must, at least twelve days before the opening of the term file with the clerk of the court a note of issue stating the title of the action, the names and addresses of the attorneys, the time when the last pleading was served, whether the action is triable by a jury or by the court without a jury, the term at which a trial of the action is desired, the specific nature and object of the action. The clerk will then enter the case upon the calendar as of the date of the filing of the note of issue. With the note of issue there must be filed proof of service of a copy of the note of issue. If the case is pending in the Connecticut Superior Court, Student's attorney will request the clerk in writing to put the case on the trial list; and the clerk will notify Policeman's attorney, ordinarily by mail, of this request. The request should be made a specified number of days before the opening of the term, but it may be made later, though never less than a prescribed period before the opening of court on the day when the case is assigned for trial. In practically all other jurisdictions some such steps must be taken by one of the parties. The latest rules must be consulted.

The foregoing notices and requests merely get the case in its regular order upon the trial list. It still has to be assigned for trial according to the local practice. In some places, on the first day of the term, the entire list or calendar is called, a determination is made whether any of them are not ready for trial during the term, and the cases for trial by jury are separated from those for trial by the court. After the unready cases are eliminated, the others may be set for trial, each for a day certain, or all in the order in which they appear on the list as revised. In other places there is no call of the list, but at stated intervals a session of the court is held for the purpose of selecting from it cases for trial during a comparatively short period then next ensuing. For example, in Connecticut a brief session is usually held on

Friday for the purpose of setting cases to be tried during the following week. In still other places, the selection of cases from the list is made by subordinate administrative officials of the court. The lawyer must always conform to the current local practice.

**Motions Before Trial.** Under modern practice either party may make a motion for judgment on the pleadings. This will raise the question whether, granting the truth of all uncontroverted allegations in the pleadings, the moving party is entitled to judgment.

In a number of jurisdictions provision is made for compelling one party to disclose to the other pertinent information before trial, for entry of summary judgment on undisputed facts disclosed by affidavit or by examination of witnesses or parties before trial, and for a pre-trial hearing in which immaterial matters and issues made by the pleadings but insupportable by evidence may be eliminated, and other measures for expediting the trial may be taken.

**Trial of the Issues.** Assume that the case of Student against Policeman has been set for trial in a specified court room immediately after the case of Jones v. Smith. Both Lawyer and Andrew will have to be ready to go on immediately at the conclusion of the Jones-Smith trial. They will be on hand with their respective clients and witnesses. If the trial is to be without a jury, the court or the clerk will call the case and the attorney for plaintiff will make his opening statement. If the trial is to be by jury the court will order the clerk to call the next case; and when he has said "Samuel Student against Peter Policeman," and the attorneys have answered that they are ready, the court will direct the clerk to call a jury.

**Same—Getting the Jury.** At common law the writ directing the sheriff to summon a jury did not specify the manner in which the jurors should be chosen, and he made his own selection of the necessary number of eligible persons. If the sheriff was known not to be an indifferent person in the litigation for which the jury was summoned, the writ was directed to the coroner; and in case he also was not indifferent, the writ was

directed to four elisors. At present statutes specify the qualifications of jurors and describe in some detail the method by which they are to be selected. The group summoned for jury duty is called the array. At common law a party to an action was entitled to challenge the array on the ground that the sheriff or coroner who made the selection was not indifferent, that is, had some interest in the case or was related to one of the parties. Under modern practice such a challenge may be made because of any substantial departure from the procedure prescribed by statute. Usually such a challenge must be made before any individual juror is chosen for the trial of the case.

Each juror must possess certain general and certain special qualifications to be eligible to act in a particular case. For example, he must usually be an elector of the jurisdiction, must not be related within a certain degree of consanguinity to either party and must be in such a state of mind toward the parties and the case as to be able to try the issue fairly and impartially. For alleged lack of any of these qualifications he may be challenged by either party, and if the challenge is found true, he will not be permitted to serve. Such challenges are termed challenges for cause. In addition by statute each party may without assigning any reason therefor, exclude a specified number of perfectly eligible jurors by peremptory challenge. The procedure with reference to challenge and to ascertaining and disclosing the reasons for challenge is not uniform. Among the various practices are the following: (1) The parties and their attorneys are confronted with the entire number of jurors summoned for service for the term and not then engaged in the trial of other causes. The attorneys, either directly or through the judge, are permitted to ask them as a body questions touching their qualifications to sit as jurors. If any juror discloses a probable ground for disqualification, he may be challenged and further examined; and even extrinsic evidence may be given to prove his ineligibility. If the challenge is found true, he is eliminated; otherwise not. After all ineligibles are thus removed, the clerk by lot selects twelve or twelve plus the number of peremptory challenges allowed, and after the peremptories are exercised or waived, the jury of twelve is sworn. (2) From among the jurors summoned for the term,

usually called the panel or the array, the clerk selects by lot to the number of twelve or to the number of twelve plus the number of peremptories. The attorneys are allowed, directly or through the judge, to examine each of these individually as to his qualifications, and to eliminate by challenge for cause any who show themselves disqualified. If any juror is thus removed, he is replaced by another who is subject to examination as if originally drawn. After the requisite number of qualified jurors is obtained, the attorneys exercise their peremptory challenges. If the number is reduced below twelve, the process is continued until the peremptory challenges are exhausted and twelve qualified jurors are secured. (3) In England and Canada the jurors are selected by lot from the panel. As each juror comes to the box either attorney may challenge him for cause or peremptorily. If peremptorily, then no examination is necessary; if for cause, then he may put questions to the juror or present other evidence to support the challenge. But no questioning of a juror prior to challenge is allowed. (4) As each juror is chosen by lot by the clerk, he is examined by the attorneys, in a prescribed order, as to his qualifications. The attorney who first examines must exercise his challenge for all reasons before turning him over to the other attorney. If he finds no ground for challenge for cause, and yet desires the juror removed, he must exercise his peremptory challenge at once. In some states as soon as a juror is accepted by both sides, he is sworn to try the issues; in others the oath is not administered until twelve have been accepted.

**Same—Opening Statements.** After the jury is sworn, the plaintiff's attorney makes his opening statement. In *Student against Policeman*, Lawyer will explain to the jurors the exact questions raised by the pleadings which they will have to answer by their verdict, what *Student* asserts to be the facts and how he intends to support these assertions by evidence. In *New York*, he will be followed immediately by *Andrew*, who will outline *Policeman's* case and inform the jurors how he intends to meet and overthrow *Student's* claims. There is no place for argument in the opening. It is made simply to present to the court and jury an outline of the case, so that they may more easily and



intelligently follow and apply the testimony. In some jurisdictions Andrew's opening will not be made until just before he is ready to offer his evidence.

**Same—Evidence.** Next Lawyer calls his first witness, who is sworn to tell the truth and nothing but the truth. By means of question and answer he gets from the witness what he knows about the matter in issue. Then Andrew has an opportunity to cross-examine; and if he brings out any new matter or makes uncertain anything given in testimony on Lawyer's examination, the latter may re-examine the witness on these points. And in some instances the witness may be subject to several re-examinations by each attorney. The same procedure is followed with each witness offered in Student's behalf. Student will doubtless be one of them. After presenting all his witnesses on his main case, Lawyer will announce that he rests, that is, that he has no further evidence to offer. Thereupon Andrew will proceed with Policeman's side of the case. If he has not already done so, he will make his opening statement. Otherwise, he will at once call his witnesses, who will be examined, cross-examined and re-examined as were Student's witnesses; after which he will state that he rests. If the course of the evidence warrants it, Lawyer will have the privilege of presenting evidence in rebuttal, and Andrew in surrebuttal.

**Same—Motions During Trial.** At the close of plaintiff's evidence, the defendant may under modern practice move that plaintiff be nonsuited or that the action be dismissed on the ground that no reasonable jury could find a verdict in favor of plaintiff; and at the close of all the evidence either party may move for a directed verdict on the ground that no reasonable jury could return a verdict except in favor of the moving party. In some jurisdictions this latter motion may be made by defendant at the close of plaintiff's testimony. If either motion is granted, it of course puts an end to the trial.

**Same—Demurrer to Evidence.** At the close of the evidence of the party having the burden of proof, the other party may at common law demur to the evidence. This demurrer must be in writing and be correct in form as well as substance if the opponent is to be required to join therein. Upon such joinder in a

properly framed demurrer the court must take the case from the jury and order judgment for the demurrant only in case no reasonable jury could have found a verdict against him upon his opponent's evidence, taking that evidence to be true; otherwise it must order judgment for the opponent. In a few American jurisdictions the demurrer to evidence is treated in all respects as a motion for a directed verdict.

**Same—Requests to Charge.** If the motions to take the case from the jury are denied, and no demurrer to the evidence is interposed, or if interposed is treated as a motion to direct a verdict, and is denied, there is opportunity for each attorney to present to the judge written requests that he deliver certain instructions to the jury. These requested instructions will declare that the jurors in considering the testimony must apply certain rules of law in ascertaining the facts and in determining the effect to be given to the facts when found. In some jurisdictions the court is not obliged to give the jury any instructions which are not so requested. The court will advise the attorneys which of the requested instructions it will give in order that they may frame their summing-up arguments accordingly. At the close of the charge a further opportunity is given counsel in some jurisdictions to ask for additional instructions.

**Same—Summing-up by Attorneys.** These arguments usually come next, though in some states they follow the charge of the court. Ordinarily Lawyer, since Student has the burden of establishing his case, will open the argument, Andrew will answer him, and Lawyer will reply in rebuttal. In some jurisdictions Andrew will open the argument and Lawyer will close, each side having but one speech. In these arguments each attorney will be confined to the evidence and will not be permitted to indulge in prejudicial immaterialities. He will try, by his analysis of the testimony and of the method of applying it to the issues, to persuade the jury that its verdict should be in his favor.

**Same—Charge of Court.** The court will then deliver its charge to the jury. This is usually done orally; in some places the court is required to reduce the instructions to writing and let the jury take them to the jury room. In almost all of the

states of the Union, this charge must not contain any comment upon the weight of the evidence or the credibility of the witnesses, but must be confined to expounding the rules of law which the jury should apply in reaching their verdict. In the federal courts, in Connecticut and a few other states, the court may express its opinion upon the weight of the evidence and the credibility of the witnesses. In England the charge is called the summing-up by the court and consists of a review and analysis of the testimony and the opinion of the court on how it should be handled, as well as a statement of the rules of law governing the case which are to be applied by the jury.

If the trial has been by the court without a jury there will be no charge, but the court may on motion indicate the rules of law which the court deems applicable. In place of a verdict, the court makes findings and an order for judgment. In some jurisdictions the finding may be general, like a general verdict; in others, including the federal courts, specific findings are required on all issues raised by the pleadings and the court's conclusions of law therefrom must be set forth.

**Same—Verdict.** At the conclusion of the charge the court places the jury in the custody of an officer, who conducts them to the jury room. In this room they deliberate upon the case in secret until they reach a verdict. In some places they deliver the verdict orally in court through their foreman; in others they return a written verdict signed by the foreman, and express oral assent thereto when it is read in open court. After the verdict is received by the court, the jury is discharged and the trial is at an end.

Provision is usually made for special verdicts and for answers to special interrogatories to accompany the verdict. The special verdict, properly drawn, contains a finding upon every issue of fact made by the pleadings, and leaves the legal result of the facts to be determined by the court. The answers to the special interrogatories are made by the jury and returned with their general verdict. Unless these answers are consistent with the verdict on decisive issues, the verdict cannot stand.

**Motion in Arrest of Judgment.** After the verdict, which may be assumed to be in Student's favor, the defendant may

move that judgment be arrested on the ground that the declaration or complaint is fatally defective in wholly failing to state a cause of action, or that upon all the pleadings his case is fatally defective in substance. The question thus raised is the same as that raised by a general demurrer; but the court's attitude at this stage of the proceeding is to resolve every doubt in favor of the pleading, because it is now supported by the verdict. The motion in arrest may also attack defects in the verdict. Indeed, it may search out errors in so much of the common law record as has then been made, that is, the writ, the pleadings and the verdict. It does not reach errors in rulings made at the trial, which must be preserved by bill of exceptions. In determining this motion, the court may render an opinion which will find its way into the law reports.

**Motion for Judgment Notwithstanding the Verdict.** If the verdict has been in favor of Policeman, Student might have moved for judgment notwithstanding the verdict, had Policeman's sole defense been one in confession and avoidance, on the ground that the facts set up in the plea or answer were totally insufficient to constitute a justification, excuse or discharge. Here too the question would be essentially the same as on a general demurrer to the plea, except that the court would indulge every reasonable presumption to support the pleading. In this case too the court might render an opinion which would be reported.

Statutory provisions are found in most states authorizing the court after verdict to order judgment notwithstanding the verdict if the court erroneously denied a motion to direct the jury to return a verdict in favor of the party against whom it was in fact returned. This must be sharply distinguished from the common law motion above described. The Supreme Court of the United States has declared that the Seventh Amendment forbids the federal courts to enter judgment notwithstanding the verdict as a means of correcting an erroneous refusal to direct a verdict. It has, however, sanctioned a device which accomplishes the same result.<sup>6</sup>

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<sup>6</sup> See *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913); *Baltimore & Carolina Line v. Redman*, 295 U. S. 654 (1935); Rule 50, Federal Rules of Civil Procedure.

**Motion for New Trial.** Under modern practice the defeated party may usually make a motion for a new trial either before or after judgment has been entered upon the verdict. This motion is usually made on the ground that the trial court over the objection and exception of the moving party made erroneous rulings during the trial, for example, in receiving inadmissible evidence, or in giving the jury an improper instruction, or on the ground that the verdict is against the weight of the evidence.

**Taxation of Costs.** If the motions made after the rendition of the verdict are denied, Student's next step is to cause his costs and disbursements to be taxed. The procedure for this matter is almost universally regulated by statute, and statutes prescribe what costs shall be allowed and what disbursements may be taxed. The defeated party is generally required to be given notice and opportunity to object.

**Judgment.** Student will next cause judgment to be entered upon the verdict. The verdict is merely a finding of the jury. In Student against Policeman, it will read: "We, the jury, find a verdict in favor of plaintiff and assess his damages at \$5,000." It must be clearly differentiated from the judgment. The judgment is an order of the court that a party do have certain relief; it will read in part: "It is ordered and adjudged that plaintiff, Samuel Student, have and recover of defendant, Peter Policeman, the sum of \$5,000 together with the sum of \$75.90 costs and disbursements as taxed, amounting in all to \$5,075.90."

**Review by Appellate Court.** When an issue of law has been finally determined by a trial court, or an issue of fact has been decided after trial by jury or by the court without a jury, the defeated party may usually have the proceedings of the trial court reviewed by a higher tribunal. The kinds of decisions reviewable are usually specified by statute and the procedure regulated by statute or rules of court. A record of the proceedings must be made up and transmitted to the reviewing court according to the rules of local practice. Everywhere this record must contain a correct statement of so much of what occurred at the trial as to show the alleged mistakes of the trial

court, the defeated party's objections and exceptions to them, and their bearing upon the issues which were tried, and it must be certified as correct by the trial court. The orthodox method of securing a review in a common law action is by writ of error; in equity by an appeal. Under modern codes the usual method is by a statutory appeal. In common law actions the review is usually confined to errors of law occurring in the trial court; questions of fact are not re-examined. In equity suits an appeal is said to require a trial *de novo* on law and facts; ordinarily, however, the appellate court does not take new testimony but makes its decision upon questions of fact upon the evidence submitted below. In *Student against Policeman*, the latter's remedy will be by writ of error or statutory appeal. His attorney will generally be required to take the following steps, though the order of procedure may vary in different jurisdictions. (1) Notify the court, usually through its clerk, and opposing counsel of his appeal to the higher tribunal. (2) Have made up a record—a bill of exceptions or settled case—which he proposes as an adequate and proper statement of so much of the proceedings before the trial court as will be pertinent to the matters to be reviewed; this will be submitted to Lawyer, who will have opportunity to suggest corrections and additions; and after a hearing, if necessary, the trial court will certify the record as originally made up or with such changes as it deems necessary. (3) See to it that this record and the required original papers or copies thereof are transmitted to the higher court. (4) Prepare a brief, which specifies the errors upon which he relies for reversal and the reasons and authorities supporting his contentions; and furnish the required number of copies of it to the court and to Lawyer. (5) In some jurisdictions see to it that the case is properly put upon the calendar of the higher court for argument, and notify Lawyer of it. Lawyer will prepare a brief in opposition and furnish copies of it to Andrew and to the court. At the appointed time Andrew and Lawyer will appear before the higher court and present their oral arguments. The court will take the case under advisement and later render its decision. A record will be made of all the proceedings in the higher court, and a portion of that record including the court's opinion will usually be printed in the official reports of the court.

Usually the appellate court will remand the case to the trial court for entry of the proper order or judgment or for further appropriate proceedings.

✓ **Procedure in Equity.** The foregoing sections of this chapter have had to do almost exclusively with actions triable at common law as distinguished from equity. In Chapter I a brief statement as to the origin and development of the English Court of Chancery is given. In the United States equity had a varied early history. There was no real development until the time of Story and Kent. At present a very few states have separate courts of equity with personnel and procedure different from those of their law courts. In more than a dozen states the same judges and other court officials function as officers of both the courts of law and the courts of equity. When functioning as courts of equity, they operate as if their judicial system provided for courts of equity separate and distinct from courts of law, and they use a procedure different from that used when they operate as courts of law. Provision is usually made for transfer of cases from the equity side to the law side and *vice versa*. Before the adoption of the Federal Rules of Civil Procedure, this system prevailed in the federal courts.

In some thirty states and the federal courts the distinction between actions at law and suits in equity has been abolished. There is only one form of civil action, and one set of rules of procedure. The complete merger of the two systems, however, is impossible because of the provision in the Seventh Amendment to the United States Constitution and a similar provision in state constitutions preserving trial by jury, for in civil actions at law trial by jury as of right was usual, whereas in equity there was no right of trial by jury.

✓ **Character of Equitable Relief.** In actions at law the successful plaintiff obtains a judgment, in most cases for money damages, in replevin for possession of the chattel, in detinue for the chattel or its value in money at defendant's option, in ejectment for possession of a parcel of realty. The judgment is not a command of the court to the defendant. If the defendant does not satisfy the judgment, the plaintiff may secure a writ ordering the sheriff to take appropriate action, but there will be no order re-

quiring the defendant to do anything. Furthermore, if there are several parties plaintiff, there can be no judgment for less than all of them; if there are several defendants, there will ordinarily be judgment against all or none. And the common law has no power to adjudicate the rights of several plaintiffs as between themselves or of several defendants as between themselves. Again the common law remedies are for past wrongs only; they give no preventive relief. Equity, on the other hand, usually operates by ordering a party to act or to refrain from acting. It may by such orders command the adjustment of relations between any two of the parties whether named as co-plaintiffs or co-defendants or as adversaries. It can order a party to make reparation for past wrongs or to refrain from doing specified wrongs in the future, or both. It may make its orders conditional or unconditional. Disobedience of an order of a court of equity constitutes a contempt of court.

For some wrongs a plaintiff may obtain relief either at law or in equity. For example, if D refuses to perform his legally enforceable promise to P to convey Blackacre to P for the sum of \$5,000, and P sues at law, he will get judgment for a sum of money equalling the value of Blackacre minus \$5,000. If he sues in equity, he will get a decree that D convey Blackacre to him on condition that P pay \$5,000 to D. If P has already paid, the decree for conveyance will be unconditional. Again if P and D are adjoining landowners and D in operating his mine is removing ore from under P's surface, P's only relief at law will be a judgment for damages. Equity will prohibit D from continuing his operations under P's surface.

There are some cases in which the right that P is claiming is not recognized at law. For example, originally the assignee of a chose in action secured no interest in the chose which a court of law would recognize. The courts of equity ruled that he did obtain an interest which they would protect. If A conveyed Blackacre to B in trust to collect the rents and profits for the benefit of C, a court of law treated B as if he were the owner of Blackacre without restriction; but a court of equity recognized and enforced the rights of C by compelling B to account to C for the rents and profits. Where the law gave no relief, obviously, equity had to act or let the wronged party go remediless. Where the law gave some relief, equity at a comparatively early



date refused to act unless it deemed the legal relief inadequate.

In many instances a plaintiff in equity would be entitled to no equitable relief unless he had an interest which the law recognized and that interest had been infringed. In such a case the court of equity could give no relief unless issues were determined such as were ordinarily decided in actions at law. If such an issue were decided against plaintiff, he would be entitled to no relief, legal or equitable. Must he, therefore, first bring an action at law and secure a judgment showing that he had such an interest and that it had been infringed; or at any rate that he had such an interest so that equity ought to prevent a threatened infringement? In some cases, equity was reluctant to take jurisdiction until after a plaintiff had established his interest by a judgment of a court of law. Thus, while a court of equity would grant a permanent injunction against repeated trespasses over land to which plaintiff's title was not disputed, it would require plaintiff first to establish his title at law if it were in dispute. In some jurisdictions the equity courts later assumed the power to decide these legal issues where the decision was a condition precedent to equitable relief and it was clear that if plaintiff had been wronged, equity alone could give adequate relief.

All of these rulings continue to be of importance in jurisdictions where there is but one form of civil action and one procedure for both actions at law and suits in equity. The so-called merger did not alter the right of trial by jury. If before the merger the plaintiff was first required to settle any such issue by an action at law, either party in a civil action after the merger is entitled to a trial of such an issue by jury; if it is decided in favor of defendant, there is no occasion for equitable relief; if in favor of plaintiff, then the judge can determine whether equitable relief is necessary to do complete justice.

✓ **Commencing the Suit.** Suit was begun by filing a bill in equity. The defendant was then subpoenaed to appear and answer the bill. Originally the subpoena was under the great seal and was a command of the king which the defendant was bound to obey.

✓ **Raising an Issue.** The bill in equity, like the declaration at common law, stated plaintiff's claim and prayer for relief. The

later pleadings by which issues of law or fact were framed are described in Chapter VI. Provisions were made for bringing the issues on for hearing similar to those in a common-law action.

**Trial in Equity.** Trial in equity was without a jury. In the classic period the witnesses were not examined orally in open court. They were examined by a master or other court official in the absence of the parties, and their testimony was reduced to writing and thus presented to the court. The proponent of the witness submitted to the examining officer the substance of the matters to be put, if not the actual interrogatories, and the opponent submitted cross-interrogatories. This, of course, was a very ineffective method of examining and cross-examining; in addition, it prevented the court from observing the witnesses and considering their demeanor and manner of testifying.

**Review by Appellate Court.** The equity court on appeal reviewed both law and facts. It still continues to do so, but since under modern practice most of the testimony in equity is taken in open court, as in a law action, the present equity courts on appeal do not interfere with findings of fact by the trial judge except where they appear to be clearly erroneous.

**Enforcement of Decrees.** Originally if D refused to obey a decree or an order that he obey the decree, he was punished for contempt. By the later practice, due to judicial decision or statute or both, execution is made more effective by processes similar to those of the law courts or by provisions which in appropriate situations, make the decrees self-executing. For example, a decree that D convey Blackacre to B may operate, under statute, as a deed.

**Administrative Tribunals.** The Congress of the United States and the legislatures of the several states have set up many administrative tribunals which perform many functions identical with, or similar to, those performed by the courts. These tribunals make investigations of fact by holding hearings which resemble trials in the courts, and their determinations are by appropriate legislation often given the same effect as either the finding of a judge in an equity case or the verdict of a jury

in a common-law action. Speaking very generally, their interpretations of statutes, their rulings as to the content of a common law rule and the applicability, as distinguished from the application of a rule of law, are subject to judicial review. Consequently, as to controversies within the jurisdiction of these tribunals, it is quite as important for the lawyer to have the same sort of knowledge with respect to these tribunals as he should have with reference to the courts.

The procedure of administrative tribunals is regulated by statute, and by rules of their own making pursuant to statute. The procedure is usually simplified and informal. Many tribunals publish reports of their decisions, and a number of unofficial publishers publish them in both temporary and permanent form. The beginning law student is rarely concerned with them, but no student can afford to leave a law school without taking courses that deal with the jurisdiction, procedure, and doings of these tribunals.

**Law Reports and Books of Selected Cases.** A description of the books in which cases decided by the courts of Great Britain and the United States are reported is given in Chapter VIII. Books of Selected Cases for use in law schools are made up by selecting appropriate cases from these reports. Most of these selected cases consist chiefly of the reported proceedings in courts of last resort and intermediate appellate courts; some of them are records of proceedings before a trial court upon a demurrer, a motion in arrest of judgment or for judgment *non obstante veredicto*, or of proceedings before the full bench upon such a motion or upon a motion for a new trial; and a few of them are transcripts of records of proceedings at the trial in courts of first instance.

## CHAPTER V

### FORMS OF ACTION

After the Norman Conquest, as shown in the first chapter, the king's courts gradually absorbed all the judicial business of the kingdom. The method by which litigation was drawn into the royal tribunals was the issuance of a royal mandate, commonly called an original writ, that is, a writ originating an action or lawsuit. The development of the system of original writs may be briefly summarized as follows: At the beginning of the Norman period the jurisdiction actually exercised by the royal courts was very narrow. But the king had the power to draw to his courts, by the issuance of special writs, each manufactured for a particular case, such causes as he desired; and he exercised this power with increasing frequency. Under Henry II the royal judicial power was greatly extended. A royal writ was necessary to compel a man to answer for his freehold. Actions for the recovery of possession of realty in the king's court were invented. In a steadily growing number of other classes of cases, the king through his chancery was issuing writs as of course. Indeed it began to look as if the royal courts, either through writs of course or special writs created for the purpose, might provide a remedy for every wrong. Under John a slight check occurred; but under Henry III the stream of writs issuing from chancery rapidly widened. As early as 1244 the barons and prelates protested. Gradually it was being perceived that the king by his invention of new writs was legislating and was frequently creating new rights. Finally in 1258 the barons extracted from the king, in the Provisions of Oxford, the pledge that his chancellor should be under oath to "seal no writs, excepting writs of course, without the commandment of the king and of his council, who shall be present."<sup>1</sup> Thereafter no new writs could be granted by the chancery; and this meant that, so far as the royal courts were concerned, a litigant whose case could not be brought within the confines of a formed writ was remediless.

<sup>1</sup> Stubbs *Select Charters* (9 ed.), 378, 380, 382, 384, 386.

At this time the writs applicable to real and mixed actions were numerous. These actions have long since been abolished. Their history is interesting and instructive; but because they have comparatively little to do with the problems of a first year student, only very brief consideration will be given to the most important of them, namely, the Writ of Right, the Assizes of Novel Disseisin and Mort D'Ancestor,<sup>2</sup> and Writs of Entry. The personal actions for which writs of course were provided were (1) Replevin, (2) Debt, (3) Detinue, (4) Covenant, (5) Annuity, (6) Account, (7) Trespass. Later (8) Case, (9) Ejectment, (10) Assumpsit, and (11) Trover were evolved. In most jurisdictions these forms too have been superseded by a single form of action created by statute. In the few jurisdictions where they still survive they have been greatly changed. But they have played so important a part in the development of our law, and so many cases still cited and accepted as precedents, and required to be studied by the beginner, turn upon the question whether the proper form of action has been used, that they demand somewhat greater notice.

**Importance of the Forms of Action.** When the medieval litigant or his lawyer applied to chancery for a formed writ, he was in effect asking for a mandate to the royal judges to take jurisdiction of and to try a cause of action properly falling within the limits of that writ. The writ was no general order or authorization to try the validity of any claim which the plaintiff might choose to assert against the defendant. If plaintiff had selected and secured a writ in debt, he could not expect the judges to try a case in trespass. As Pollock and Maitland put it:<sup>3</sup>

“The metaphor which likens the chancery to a shop is trite; we will liken it to an armoury. It contains every weapon of medieval warfare from the two-handed sword to the poniard. The man who has a quarrel with his neighbor

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<sup>2</sup> The Assize Utrum decided whether land was land which had been given by way of alms to the Church or was lay fee. The Assize Darrein Presentment determined who presented the last parson to a church now vacant, so that he would be entitled to present the parson for the existing vacancy, but without prejudice to the ultimate question of the right to present. Both of these were of prime importance in their day, but are of no interest to the beginning law student.

<sup>3</sup> 2 Pollock and Maitland, *History of English Law* (2 ed.), 561.

comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace. To drop metaphor, our plaintiff is not merely choosing a writ, he is choosing an action, and every action has its own rules."

And this remained true as long as the formulary system endured. Professor Maitland, in pointing out the practical importance of distinguishing between the several forms of action, said:<sup>4</sup>

" 'A form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong."

The truth of the foregoing is dramatically illustrated in many a case in our American reports. A failure to keep it steadily in

<sup>4</sup> Maitland, *Equity and the Forms of Action*, 298.

mind will frequently result in a complete misinterpretation of a decision. For example, suppose that plaintiff brings an action of trespass against a railway company and alleges that he was a passenger upon defendant's railway and had paid the fare which entitled him to be carried from station A to station M, that he was by defendant wrongfully compelled to leave the train at way station G; that as a result thereof he had to remain at G for a period of twelve hours, suffered greatly from cold, hunger, fatigue, and anxiety, so that he became sick, sore, and disabled, to his damage in the sum of \$5,000. The defendant contends that plaintiff has stated no ground for recovery, and the court sustains the defendant's contention. Is the court declaring that the defendant has done the plaintiff no wrong for which the law will give him redress, that a railway company has the legal privilege to compel a passenger to interrupt his journey in this fashion? <sup>5</sup>

Or suppose that plaintiff has brought an action in debt alleging that defendant is indebted to him in the sum of \$500, and defendant has denied the debt. At the trial plaintiff proves that (a) defendant negligently damaged some of plaintiff's goods, (b) plaintiff made a demand on defendant for compensation, (c) defendant promised plaintiff that if plaintiff would have the goods repaired defendant would pay the bill, (d) plaintiff thereafter had the goods repaired and the bill for such repairs was \$500, (e) plaintiff presented the bill to defendant, and (f) defendant stated that the bill was correct and he would pay it, but later repudiated his promise and refused to pay it. The court decides for the defendant. Does this decision mean that plaintiff has no cause of action at all against the defendant, or that he has no cause of action except for the original negligence? Is this an authority that there is no action for breach of an accord executory? <sup>6</sup>

Again, suppose that plaintiff brings an action of trover against the defendant, and at the trial the following facts are shown without dispute. Plaintiff leased certain premises from defendant to be used as a butcher shop. The lease was signed before the front wall of the building was completed, and plaintiff moved a very large refrigerator in through this front part. At the

<sup>5</sup> See *Barnum v. Baltimore & O. R. Co.* (1871), 5 W. Va. 10.

<sup>6</sup> Cf. *W. F. Parker & Son v. Clemon* (1908), 80 Vt. 521, 68 Atl. 646.

termination of the lease plaintiff requested permission of defendant to remove the front show windows for the purpose of taking out the refrigerator and promised to replace the windows. Defendant refused to allow plaintiff to enlarge any of the means of egress from the building or to remove such windows, and it was otherwise impossible for plaintiff to remove the refrigerator without cutting it into pieces and thereby destroying it. Defendant was entirely willing that plaintiff should remove the refrigerator or any part thereof through any of the then existing ways of exit from the building. If the court holds that judgment must be entered for the defendant, will its decision be a precedent to be used in a later lawsuit on substantially the same facts where the plaintiff sues in an action on the case, or under a modern code in a formless action? May it be properly cited to show that defendant has violated no legal duty owed to the plaintiff?

None of the foregoing queries can be safely answered, or indeed answered at all, without considering with great care the scope of the action used. In the first case the decision is merely that the wrong of which the plaintiff complained was not remediable in an action of trespass; in the second, that plaintiff's proof did not disclose an obligation on the part of defendant for breach of which an action of debt would lie; in the third, that upon the undisputed facts plaintiff had no cause of action in trover. In announcing its decision, the court might indicate whether in its opinion plaintiff would have fared better had he employed some other form of action; but any observations upon this point would not be essential. And in evaluating the decision, this must not for a moment be overlooked by judge, lawyer or student.

**Writ of Right.** Glanvill, whose book was probably written before the end of 1189, tells us of two chief forms of writ available to him who is demanding freehold land. The first, a *praecipe in capite*, is peculiarly appropriate where he claims to hold the land directly of the King. It directs the sheriff to command the tenant of the land to render it to the demandant, and if the tenant fails to do so, to summon him to come before the King or his Justices to show why he has not done so. The second, *breve de recto tenendo*, is usable when the demandant claims to



hold of an intermediate lord. It is addressed to the lord and commands him "to hold full right" of the land to the demandant, and "unless you do so, the Sheriff of Oxford shall do it lest I should hear any more complaint for want of justice." If the lord fail to do justice, the case may be removed from his court to a royal court. The usual method of trial was by battle;<sup>7</sup> but legislation of Henry II gave the tenant the privilege of trial by the Grand Assize. If he claimed the privilege in a case in the lord's court, it was immediately removed to a royal court. Trial by the Grand Assize resembled trial by jury. Twelve Knights, chosen by four other Knights, were summoned and sworn to answer who, the demandant or the tenant, had the better right to the land.<sup>8</sup> Their answer determined as between the parties which was the owner. Although disputes as to land

<sup>7</sup>The last reported instance of trial by battle in a writ of right occurred in 1571 in the case of *Lowe and Kyme v. Paramour*, reported in 3 Dyer 301. In civil actions the battle was not between the parties but between their champions, for if a party to an action was killed, the action abated and no judgment could be given. The report in the *Paramour* case describes the field and the appearance and equipment of the champions; but no battle was fought because the demandant himself failed to appear. A full description of trial by "wager of battel" is found in subdivision V of Chapter 22 of Book III of Blackstone, *Commentaries on the Laws of England*.

In *Ashford v. Thornton*, 1 B. & Ald. 405, 409, 410, 461 (1818), Ashford brought an appeal of murder against Thornton after the latter had been acquitted of the alleged murder and of the alleged rape of the victim. Thornton's plea was: "Not guilty; and I am ready to defend the same by my body." Ashford put in a counterplea that Thornton was not entitled to wage battle because of "violent and strong presumptions" of guilt. To a replication setting up an alibi Ashford demurred. The demurrer was argued by Chitty for Ashford and by Tindal for Thornton. They cited and quoted from all the previous authorities, text writers and decisions, beginning with Glanvill. The Court held unanimously that Thornton was entitled to wage battle, but was in doubt whether the judgment should be that Thornton be allowed his wager of battle or should go without day. Later by consent of both parties Thornton was discharged. He was immediately arraigned "on the appeal, at the suit of the king, to which he pleaded instanter 'autrefois acquit.'" The Attorney General "confessed the plea to be true." The Court gave judgment for Thornton, and he was immediately discharged.

<sup>8</sup>In *Wigot and Clarks Case*, 1 Leon. 303 (32 Eliz.), it is reported that "at the day of the return of the Pannel by them made, the 4 Knights and 12 others were sworn to try the issue. . . ."

not held in chief of the Crown were in theory to originate only in the lord's court by a writ, *breve de recto tenendo*, Glanvill makes it clear that a *praecipe in capite* might issue in such a case if the King was pleased that it should be decided there. And while the *breve de recto tenendo* is, strictly speaking, the writ of right, the *praecipe in capite* also has generally been so designated.

The delays in adjudication caused by adjournments and postponements due to excusable nonappearances by a party and due at times to failure of members of the Grand Assize to be present made the use of a writ of right a costly, cumbersome and rather ineffective remedy. And since, at the option of the tenant, trial might be by battle, the outcome might have little, if any, relation to the merits. The possessory assizes and writs of entry, being less expensive, subject to fewer delays, and triable by recognitors or jurors, made resort to the writ of right less and less frequent, and the action of ejectment almost completely displaced it. It was, however, not formally abolished until 1819.<sup>9</sup>

**Assize of Novel Disseisin.** In the reign of Henry II, and perhaps as early as 1166, this action was invented for the protection of possession of realty. The effect of its creation was to entitle a person seised of a parcel of land, no matter how wrongfully, to remain in possession of it until ousted by process of law. If A had dispossessed B of B's land and had acquired seisin of it, and B had thereafter reentered and ejected A, A might maintain the action against B and be given judgment, and put B to a writ of right to recover on the strength of his title. In Glanvill's time the writ commanded the sheriff to summon twelve men, called recognitors, to answer whether the tenant had wrongfully and without judgment disseised the demandant of Blackacre since the King's last journey to Normandy. Originally the men summoned were to answer that question categorically.

This simple summary action could not long escape modification. The plaintiff or demandant was at an early date required to state how he had gained his seisin, and the tenant or defendant was permitted to file certain special pleas. The action lay

<sup>9</sup> The text deals only with the writ of right proper and not with the numerous writs in the nature of writs of right. See Booth, *Real Actions* (2 ed., 1811) Book II, Ch. II.

only by the disseisee against the disseisor; it would not lie against the heir of the disseisor, or by the heir of the disseisee. But if the disseisor were still alive and he had enfeoffed another or had been in turn disseised by another, the action lay against him and the other. The tenant could not, however, raise the question of proprietary right, for "unjustly and without judgment" did not mean without proprietary right.

Novel disseisin means recent disseisin. Originally the action had to be brought within a comparatively brief period after defendant's wrong. The period was specified from time to time in royal ordinances, but in 1540, the disseisin was novel if it occurred after 1216. By statute of 32 Henry VIII the period was fixed at thirty years. The defendant's wrong must be a disseisin as distinguished from a mere intrusion, and the wronged party had a limited time, four or five days, for the exercise of self-help. Even in Bracton's time, however, fiction began to play a part in expanding the remedy, and the plaintiff might treat as a disseisin what amounted merely to repeated trespass without ejectment of plaintiff.

**Assize of Mort D'Ancestor.** This action dates from 1176. If A died seised of Blackacre as of fee, his seisin did not automatically pass to B, his nearest heir, although his right of seisin did. If an interloper entered before B, B had a long period for self-help, perhaps as much as a year. After that period B was put to an action. If he were the son, daughter, brother, sister, nephew or niece of A, his action would be the assize of mort d'ancestor, in which the sheriff would summon twelve recognitors to answer whether A died seised of Blackacre and whether the demandant was his nearest heir (i.e. within the specified relationship) at the date of A's death. The action was not quite as summary as the assize of novel disseisin, for the tenant was allowed some essoins (excuses for delay) and could in some instances vouch to warranty a person not named in the writ. But as in novel disseisin, he could not raise the issue of proprietary right, although the demandant could not prevail unless the recognitors found that A was seised as of fee at the date of his death. This did not mean seised as of right. As Pollock and Maitland put it, ". . . every person who is seised is seised as of fee, unless he has come to his seisin by some title which gives him no more than an estate

for life. A disseisor who has, and knows that he has, no right whatever, becomes seised in fee."<sup>10</sup>

The action lay by B against the person in possession who entered and acquired seisin before B after A's death and against anyone who thereafter acquired seisin except by disseising B. Acquisition by inheritance or by purchase in good faith was no defense. But if the tenant claimed as heir of A, B must seek a higher remedy.

The apparently arbitrary limitation of the remedy to the blood relatives above mentioned was later mitigated by the invention of writs of *aiel*, *besaiei* and *cosinage*, which gave a similar action to one whose grandfather, great-grandfather or cousin was seised of the land at the date of his death.

**Writs of Entry.**<sup>11</sup> The remedy of novel disseisin was strictly limited; the disseisor must be a party defendant. Suppose that A has brought an action of novel disseisin against B, and B dies. The action necessarily abates. May A have a remedy against B's heir which will try the same issue as if B had lived? B's heir can enter only by reason of B's prior entry; if that entry was a disseisin, A should be restored to possession without having to resort to the cumbersome writ of right. As early as Richard I we find such a writ, and soon thereafter (1205) it became a writ of course. Not many years later a similar writ for the heir of the disseisor who has died while the novel disseisin was pending is found. Later the limitation of the writ to those who had such pending actions of novel disseisin was disregarded; and a claimant was entitled to seek restoration of land obtained by disseisin by alleging that the tenant held only by disseisin or through the disseisin of another. Writs of this class were called writs of entry sur disseisin. Until 1267 the action lay by the disseisee or his heir against only (a) the disseisor or his immediate successor in interest (his heir or feoffee), or (b) one who claimed immediately through the latter. Where the tenant was alleged to be claiming immediately through the disseisor, the writ was said to be in the *per*, that is, the tenant had no entry except (*per*) through the disseisor. Where the tenant was alleged to be claim-

<sup>10</sup> 2 Pollock and Maitland, History of English Law (2 ed. 1898), 58.

<sup>11</sup> See 2 Pollock and Maitland, History of English Law (2 ed. 1898), 63-75.

ing immediately through the disseisor's immediate successor in interest, the writ was said to be in the *per* and *cui*, that is, the tenant had no entry except through the disseisor's immediate successor (*cui*) to whom the disseisor had demised the land. The Statute of Marlborough (1267) extended the action by giving a similar writ against anyone who had no entry except one derived after a disseisin. This was called a writ of entry sur disseisin in the *post*. It was probably not until the reign of Richard II (1377-1399) that a writ of entry could be used where an assize of novel disseisin would be an appropriate remedy.

The writ was in the form of a *praecipe quod reddat*, that is, the sheriff was ordered to command the tenant justly and without delay to give the land over to the demandant or to appear and show why he had not done so.

The foregoing writs all assume that there has been a disseisin and that the tenant's interest has been derived mediately or immediately from the disseisor. But there were many situations in which the tenant's interest had origin in no disseisin. Suppose he was in effect a mortgagee in possession and at the due date of the mortgage debt refused to accept payment or to turn back the land, or that he was a lessee whose term had expired, or that he had obtained seisin of the land of a woman, now a widow, under a grant made by her husband in his lifetime. Should he be able to put the demandant to his costly and cumbersome writ of right, or should he be obliged to respond to a writ fashioned like the writ of entry sur disseisin, stating as his only entry one which disclosed the pertinent fatal defect? By the time Bracton wrote, the demandant had an available writ of entry in a large number of such situations. And at a later period it could be said with substantial accuracy that generally a writ of entry was appropriate where the tenant entered lawfully but was retaining possession wrongfully as against the demandant.

**Replevin.** This is one of the oldest of the formed personal actions.<sup>12</sup> Its invention is credited to Glanvill by the Mirror

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<sup>12</sup> Among the earliest cases are *Abbot v. Croft* (*temp.* Rich. I), 24 Pipe Roll Soc. 240; *Kingswood v. Hereford* (1200), 2 Rot. Cur. Reg. 233; *Alanson v. Warren* (1201), 1 Curia Regis Rolls 408; *Bukerel v. Aestede* (1230), Br. N. B. pl. 477. Cf. Ames, 65, n. 1. Replevin of land seized for default of appearance in a writ of right and replevin

of Justices, a book of questionable authority,<sup>13</sup> and the form of the writ is given in the book which bears his name.<sup>14</sup> It owes its origin to the policy of the royal courts to keep the exercise of the privilege of distress within bounds. In medieval England a feudal lord was at liberty to distrain his vassal's chattels for failure of the latter to render his feudal services or for arrears of rent, that is to say, he might lawfully seize the chattels found upon the tenement and keep them until the tenant either tendered what was due or gave security to try in a proper court the validity of the caption.<sup>15</sup> In certain other cases also distraint was permitted, as where trespassing animals were taken doing damage.<sup>16</sup> If the distrainer wrongfully levied a distress, or if he refused to return the chattels when the rent in arrears or proper compensation was offered before the chattels were impounded, the distrainee's remedy was the action of replevin.<sup>17</sup> From chancery he obtained a writ requiring the sheriff to retake the chattels and hand them back to him. Thus whether the distress had been wrongfully or rightfully levied, the plaintiff secured the return of his goods without giving the defendant an opportunity to be heard. Plaintiff was required to furnish pledges that he would prosecute the action. But if pending the trial, he disposed of the goods and became insolvent, the defendant was deprived of his remedy of distress. To prevent this undesirable

of men in arrest were anciently known but are not treated here because they have no bearing upon the modern action.

<sup>13</sup> See 1 Pollock and Maitland, *History of English Law* (2 ed. 1898), 28; 2 id. 478, n. 1.

<sup>14</sup> See 1 id. 162-166. These authors think Glanvill was not the author of the book, but, whoever the author, "it is plain that he was one who was very familiar with the justice done in the king's court during the last years of Henry II" (p. 165).

<sup>15</sup> There were rules as to the chattels subject to distress and the manner of exercising the right to distrain; and the lord's refusal to hand over the chattels after gage and pledge was a serious offense. 2 Pollock and Maitland, *History of English Law*, 576, 577; Gilbert, *Law of Distresses and Replevins* (1757 ed.), Ch. I.

<sup>16</sup> See Gilbert, *The Law of Replevins*, Ch. I, and Ames, *Lectures on Legal History*, 64, for further details as to distress.

<sup>17</sup> Gilbert explains that when the chattels are impounded, they are in the custody of the law and "the Person distraining cannot be said unlawfully to detain what is in the Custody and Care of the Law." Gilbert, *op. cit.* note 15, *supra*, Ch. VIII.

result, the statute of Westminster II, chapter 2 (1285), required the plaintiff to give security for the return of the chattels in case the lawsuit terminated in defendant's favor. If plaintiff won, he kept the chattels and recovered damages for the wrongful detention; if he lost, he had to return the goods to the defendant.

Because of the expense and delay necessarily incident to procuring a writ from chancery by those living far from Westminster, the Statute of Marlebridge (1259) authorized the sheriff to make the recaption from defendant and delivery to plaintiff upon the complaint of the plaintiff without a royal writ. This soon became the usual method of commencing a replevin action.<sup>18</sup> The trial occurred before the sheriff in the County Court, wherein for this purpose he presided as a royal justiciar.<sup>19</sup>

Originally the defendant lord could defeat the action by claiming ownership of the chattels when the sheriff sought to replevy them. To avoid the dishonest use of this too easy device, the writ *de proprietate probanda* was invented, which authorized the sheriff, in such cases, to take an inquest of ownership. If ownership were found in defendant, the action terminated; otherwise it went on and defendant might plead ownership as a defense. Originally also a plea of ownership or property in defendant ended the action, but early in the reign of Edward III (1327-1377) it was treated only as a plea to the declaration.<sup>20</sup> Early in the fourteenth century and thereafter pleas of property in a third person coupled with a denial of property in the plaintiff are common;<sup>21</sup> and the modern cases show a conflict of authority as to whether plaintiff from whose possession defendant wrongfully takes a chattel must show that his possession was

<sup>18</sup> See Stephen, Pleading (Williston's ed.), \*19, note m: "The action of replevin here mentioned is that by *plaint*, which is the only kind known in practice. There was anciently in use another species of replevin, in which a writ issued out of the Court of Chancery, directed to the sheriff."

<sup>19</sup> Bracton, *De Legibus et Consuetudinibus Angliæ*, folio 155; 2 Pollock and Maitland, *History of English Law* (2 ed.), 577.

<sup>20</sup> See Morris, Replevin, 17-30; Ames, *Lectures on Legal History*, 66-69; 3 Street, *Foundations of Legal Liability*, Ch. XVI. For a somewhat similar scheme of the tenant to defeat the landlord's plea in justification, see Gilbert, *The Law of Replevins*, 73, 129 et seq.

<sup>21</sup> 34 Yale L. J. 72-87.

rightful as against the whole world or only as against the defendant.<sup>22</sup>

Near the end of the fifteenth century the scope of the action was expanded by judicial decision to cover wrongful seizure of chattels whether by way of distress or otherwise.<sup>23</sup> Some attempts were later made to bring within its limits relief for the wrongful detention of goods which had come into defendant's possession without any previous taking, that is, to extend replevin to cases of mere wrongful detention; but in England the courts refused to go so far without the aid of legislation.<sup>24</sup> While the orthodox rule in this country was the same as in England,<sup>25</sup> Pennsylvania and Massachusetts made the extension in early decisions.<sup>26</sup> The early English cases had no difficulty in allowing plaintiff to recover damages where defendant had wrongfully parted with possession; but the American cases are in conflict on this point.<sup>27</sup> In most states the action is now governed by statute.

One of the early methods of trial in this action was compurgation or wager of law.<sup>28</sup> It was common before the sheriff in the County Court<sup>29</sup> and was not unknown in the royal courts.<sup>30</sup> When defendant denied the wrongful caption and detention, he "waged his law," that is, he gave pledges that on a later day fixed by the court he would appear with a specified number of oath-helpers and "make his law." On the day set, he and his oath-helpers came into court. He swore that he did not take and detain the chattels as alleged by plaintiff; and his oath-helpers, according to the earlier form, swore that he spoke the truth; according to the later form, that they believed that he

<sup>22</sup> See *Walpole v. Smith* (1837), 4 Blackf. (Ind.) 304; *Waterman v. Robinson* (1809), 5 Mass. 303; *Anderson v. Gouldberg* (1892), 51 Minn. 294; 20 Columbia L. Rev. 622 (1920).

<sup>23</sup> Ames, *Lectures on Legal History*, 69-70.

<sup>24</sup> *Mennie v. Blake*, 6 E. & B. 842 (1856).

<sup>25</sup> *Woodward v. Grand Trunk Ry. Co.*, 46 N. H. 524 (1866).

<sup>26</sup> *Stoughton v. Rappalo*, 3 S. & R. (Pa.) 559 (1818); *Baker v. Fales*, 16 Mass. 146 (1819).

<sup>27</sup> See *Sayward v. Warren* (1847), 27 Me. 453; *Ramsdell v. Buswell* (1867), 54 Me. 546.

<sup>28</sup> 2 Pollock and Maitland, *History of English Law* 634, n. 8.

<sup>29</sup> Ames, *Lectures on Legal History*, 65.

<sup>30</sup> Bracton's *Note Book*, pleas 477, 741.



spoke the truth.<sup>31</sup> If defendant and his oath-helpers repeated the proper oaths with the requisite precision, judgment was given for defendant; if they or any of them failed, the "oath burst," and judgment went for plaintiff. Toward the end of the thirteenth century, this mode of trial was obsolescent, if not obsolete, in the royal courts; and trial by jury soon completely displaced it.

**Debt.** In a writ of right for land the sheriff was directed to command the tenant (defendant) justly and without delay to render to the demandant (plaintiff) a certain piece of realty which the demandant claimed to be his right and inheritance and of which he complained that the tenant was unjustly deforcing him.<sup>32</sup> And unless the tenant did so, he was to be summoned before the justices to show why he had not done it. In the writ of debt, as given by Glanvill, the sheriff is ordered to command the defendant to render to plaintiff a specified sum of money which defendant owes to plaintiff and of which he unjustly deforces him. And if he will not do it, he is to be summoned before the justices to show why he has not done it. The writ of debt seems to have been a writ of right for money; the action to have been a real action.<sup>33</sup> The conception of the courts of that time

<sup>31</sup> The form of oath of the oath-helpers in Anglo-Saxon times was the following: "By the Lord, the oath is clean and unperjured which N has sworn." Henry C. Lea, *Superstition and Force* (3 ed., 1878), 53. The procedure in 1699 in an action of debt is described in the report of an anonymous case in 2 Salkeld 682: "The defendant waged his law, and a day was given upon the roll for him to come and make his law; and now upon the last day of the term he came. . . . And the defendant was set at the right corner of the bar, without the bar, and the secondary asked him, If he was ready to wage his law? He answered, Yes; then he laid his hand upon the book, and then the plaintiff was called. . . . Then the Court admonished him (i. e., the defendant) and also his compurgators, which they regarded not so much as to desist from it; accordingly, the defendant was sworn, that he owed not the money *modo & forma*, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true."

<sup>32</sup> This was the "*Praecipe in capite*," not the "*Breve de recto tenendo*."

<sup>33</sup> 2 Pollock and Maitland, *History of English Law*, 204-206. But see Plucknett, *Concise History of the Common Law* (2 ed. 1936) 325.

was that the debtor was holding back something which he had granted, and which therefore actually belonged, to the creditor, not that he was merely under an obligation to pay money. Indeed, the action lay for chattels as well as for money.

The plea rolls of Richard I (1189-1199) and of John (1199-1216), as well as the treatise of Glanvill, show this action to be one of the earliest formed actions, but its use was rather infrequent until near the end of Henry III's reign (1216-1272). By that time the form of the writ had somewhat changed. It no longer spoke of deforming plaintiff of the money but simply of unjustly detaining it. It was employed "but rarely save for five purposes: it was used, namely, to obtain (1) money lent, (2) the price of goods sold, (3) arrears of rent due upon a lease for years, (4) money due from a surety (*plegius*),<sup>34</sup> and (5) a debt confessed by a sealed document. We cannot say that any theory hemmed the action within these narrow limits. As anything that we should call a contract was not its essence, we soon find that it can be used whenever a fixed sum, 'a sum certain,' is due from one man to another. Statutory penalties, forfeitures under by-laws, amercements inflicted by inferior courts, money adjudged by any court, can be recovered by it. This was never forgotten in England so long as the old system of common law pleading was retained."<sup>35</sup>

In these early precedents is found ample justification for the wide scope of the modern action, which lay in four chief classes of cases. The writ was the same in all classes. The distinctions were taken in the pleadings and in the mode of trial. The declaration in each case set forth the *causa debendi*. A plea which might properly be interposed in one class might be demurrable in another; and the course of the subsequent pleadings depended upon the plea.

<sup>34</sup> See 2 Pollock and Maitland, *History of English Law*, 191. "We must remember that in very old times the surety or pledge had in truth been the principal debtor, the creditor's only debtor, while his possession of the *wed* gave him power over the person whose *plegius* he was." P. 211. "The action against the surety has had its own separate history." P. 211, n. 4. "So late as 1314 (Y. B. 7 Edw. II f. 242) an action of debt is brought against a surety who has not bound himself by sealed instrument." This was one of the cases where under the later law debt would not lie.

<sup>35</sup> 2 *Id.* 210.

1. Debt on a record was debt brought to recover money due on a record, for example, on a judgment of a domestic court of record. When debt was brought to recover on a judgment of a foreign court, whether of record or not, or upon a judgment of a domestic court not of record, the course of the pleadings was not that of debt on a record. The defendant might plead the general issue, "*nil debet*," whereas in debt on a record the general issue was "*nul tiel record*," and *nil debet* was not a proper plea.

2. Debt on a statute lay where the plaintiff was seeking to recover a definite sum due from defendant as a penalty or forfeiture under a statute. For example, where a statute provided that for an infringement by A of a specified right of B, A should forfeit a fixed sum to B, B might have an action of debt, but not where the statute allowed B multiple damages rather than a fixed sum. *Nil debet* was a proper plea.

3. Debt on a specialty or debt on a bond was used for the recovery of money which the defendant had promised to pay, or had admitted to be owing, to plaintiff in a writing under defendant's seal. Here *nil debet* was not a proper plea. The so-called general issue was *non est factum*.

4. Debt on a simple contract was the phrase commonly used to describe the action (a) when brought to recover on defendant's unsealed promise to pay money in exchange for a *quid pro quo* received by him, as, for example, for goods sold and delivered or services rendered;<sup>36</sup> (b) when brought to recover on an obligation imposed upon defendant by law, other than statute or record, to pay a liquidated sum, as, for example, on a foreign judgment, or on a judgment of a domestic court not of record, or for money received and kept by defendant under such circumstances that the law created a duty in him to pay it over to the plaintiff. Here *nil debet* was the plea of general issue.

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<sup>36</sup> See id. 211: "But we much doubt whether at the end of the thirteenth century the action extended beyond those cases in which the defendant had received some material thing or some service from the plaintiff"; Ames, Lectures on Legal History, 93-94: ". . . it became a settled rule that whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff."

The early cases lay much stress upon the requirement that the claim sued upon must be for a definite amount. Indeed, Ames says:

“The ancient conception of a creditor’s claim in debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *praecipe quod reddat*. If he demanded a debt of £20 and proved a debt of £19, he failed as effectually as if he had declared in detinue for the recovery of a horse and could prove only the detention of a cow. . . .”<sup>37</sup> “The obligation must be for a definite amount. A promise to pay as much as certain goods or services were worth would never support a count in debt.”<sup>38</sup>

But before the end of the eighteenth century it was settled that the plaintiff might recover a smaller sum than that stated in the writ if the obligation proved was for a specified amount.<sup>39</sup> Later the “sum certain” was certain enough if its amount could be determined by extrinsic evidence before action brought. The English courts probably never went further than this.<sup>40</sup> But certainly many of the later American cases permitted debt to lie for the reasonable value of goods sold, and services rendered, where that value was determined only by the verdict of the jury.<sup>41</sup>

Originally trial by battle, as in the old real writ of right for land, was probably allowed, but no reported case of its use has been found. In debt on a simple contract, the defendant had the privilege of proof by compurgation,<sup>42</sup> but it is doubtful if this

<sup>37</sup> Ames, Lectures on Legal History, 88.

<sup>38</sup> Id. 89.

<sup>39</sup> Blackstone asserts the old rule giving an example similar to that in the quotation from Ames. 3 Blackstone, Commentaries on the Laws of England, (10th London ed. 1787) 154; but see Ames, Lectures on Legal History, 90, and *Ingledew v. Cripps* (1702), 2 Ld. Raymond 814; *McQuillin v. Cox*, 1 H. Bl. 249 (1789).

<sup>40</sup> See Ames, Lectures on Legal History, 89, n. 9: “I Chitty Pl. 7 ed., 351, 721, gives a precedent of such a count, but says it has been doubted whether it lies. There is no case of it.”

<sup>41</sup> *Thompson v. French* (1837), 10 Yerg. (Tenn.) 452; *Norris v. Windsor* (1835), 12 Me. 293; *Van Deusen v. Blum* (1836), 18 Pick. (Mass.) 229.

<sup>42</sup> See note 31, p. 92, supra.

was true in debt on a statute. In the seventeenth and eighteenth centuries, the courts imposed some limitations upon this privilege, but it was not until 1833 that it was abolished.<sup>43</sup> In debt on a record and debt on a specialty wager of law was not permitted in the royal courts. If the record was denied, trial by inspection and examination of the record was the proper procedure.<sup>44</sup> In debt on a specialty trial was normally by jury.<sup>45</sup> After 1833 disputed questions of fact in an action of debt had to be tried by jury as in other actions.<sup>46</sup>

**Detinue.** Originally this action and debt were identical. As stated above, debt lay for chattels as well as for money. A loan of money, a loan of grain to be consumed or used for seed, and a loan of a chattel to be returned in specie were not distinguished. Of course the lender did not expect to get back the very coins or grain with which he had parted, but he did count upon re-

<sup>43</sup>King v. Williams, 2 B. & C. 538 (K. B. 1824): In an action of debt on simple contract defendant pleaded "nil debet per legem," defendant's counsel "applied to the Court to assign the number of compurgators, with whom the defendant should come to perfect his law. The books leave it doubtful whether six or eleven are necessary." Abbott, C. J., said: "The Court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient. If the plaintiff is not satisfied with the number brought, the objection will be open to him, and then the Court will hear both sides." The report concludes: "The defendant prepared to bring eleven compurgators, but the plaintiff abandoned the action."

<sup>44</sup>Stephen, Pleading (Williston's ed.) \*112: "The trial by the record applies to cases where an issue of nul tiel record is joined in any action . . . and the court awards in such case a trial by inspection and examination of the record. Upon this, the party affirming its existence is bound to produce it in court, on a day given for the purpose; and, if he fail to do so, judgment is given for his adversary. The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue. . . ."

<sup>45</sup>See Ormsby v. Loveday, Y. B. 4 Ed. II, 11 (1310); Finchingsfeld v. Byrcho (1311), id. 153; Upton v. Milton (1311), id. 156. But cf. 2 Pollock and Maitland, History of English Law, 224 and cases cited in note 2.

<sup>46</sup>See Childress v. Emory (1823), 8 Wheat. (21 U. S.) 642, 675, where Mr. Justice Story doubts whether wager of law ever existed in the United States.

ceiving again his horse or his plow. This distinction in fact began to manifest itself in the language of the writ and of the pleadings. The borrower owed and unjustly detained the money or the grain; he only unjustly detained the horse or the plow. Detinue slowly branched off from debt.<sup>47</sup> Debt lay for money or for a fixed amount of unascertained chattels, detinue for a specific ascertained chattel.<sup>48</sup>

At first detinue lay only by a bailor against his bailee. The plaintiff's declaration must allege a bailment and a wrongful detention by the bailee, and failure to prove the bailment was fatal to plaintiff's case. It was expanded to cover wrongful detention of a chattel, first, by one who received it from the bailee by will or intestate succession, next, by one to whose hands it came by whatsoever means after the bailee's death, and then by one who got it from the bailee during the bailee's lifetime.<sup>49</sup> At a comparatively early period also it could be maintained by a third person to whom the bailee had promised the bailor to deliver the bailed chattel.<sup>50</sup> As debt lay against the buyer for the price of goods sold and delivered, so detinue lay against the seller for goods bargained and sold but not delivered, for which the price had been paid. The title had passed to the buyer, and the seller was thereafter a mere bailee. But what of the case where the title had passed, but the agreed price had not been paid? Here the seller had received no *quid pro quo* except the buyer's promise. If that promise were embodied in a specialty, the sealed instrument might well serve as the *quid pro quo*. If it were a mere oral or unsealed promise, however, there was more difficulty. Yet might not the transaction be regarded as one of mutual grants, the seller a bailee of the chattel, the buyer owing and detaining the money, justly until it was due and unjustly thereafter? So the courts came to look at it by the middle of the reign of Henry VI (1422-1461).<sup>51</sup>

In the fourteenth century cases are found in which detinue is held the proper remedy to recover a chattel lost by the plaintiff and found in the possession of the defendant who has refused

<sup>47</sup> 2 Pollock and Maitland, *History of English Law*, 173-176.

<sup>48</sup> Ames, *Lectures on Legal History*, 89.

<sup>49</sup> *Id.* 73, 74.

<sup>50</sup> *Id.* 73, n. 1; 77, n. 1.

<sup>51</sup> *Id.* 77, 78.

to surrender it on proper demand. The classic declarations in detinue accordingly contain an allegation of bailment by plaintiff or of a loss by plaintiff and an allegation of wrongful detention by defendant; and the bailment or loss originally had to be proved as alleged.<sup>52</sup> About the end of the sixteenth century the courts declared the allegation of bailment or loss to be mere matter of form. The defendant was not permitted to deny it, and plaintiff was not required to support it by proof.<sup>53</sup> The wrongful detention was the gist of the action, and detinue came to be a remedy for any wrongful detention of a specific ascertained chattel regardless of the manner in which the defendant acquired possession of it. As in replevin, the English cases require plaintiff to have a right to immediate possession good as against the whole world, while many American cases require his right to be only superior to that of defendant.

If the plaintiff was successful he was entitled to either the chattel itself or its value as assessed in the action plus damages for the wrongful detention. Since plaintiff's theory is that the chattel is still plaintiff's, the value is assessed by the jury as of the date of the trial. The defendant, however, has the option of handing back the chattel or of paying over the value as assessed.<sup>54</sup> The theory of plaintiff's present ownership and the consequent measure of damages, and the fact that defendant has such an option have given the courts some trouble in handling the case where defendant has wrongfully parted with possession of the chattel or has destroyed it. It seems pretty generally agreed that the action lies notwithstanding that defendant no longer possesses the chattel,<sup>55</sup> but the few American cases in point seem to deny the action where the chattel has been destroyed before action brought.<sup>56</sup> They seem to exhibit an un-

<sup>52</sup> *Id.* 78, 82, 184.

<sup>53</sup> 2 Pollock and Maitland, *History of English Law*, 176; Ames, *Lectures on Legal History*, 184. See *Gledstane v. Hewitt*, 1 C. & J. 565 (1831).

<sup>54</sup> 2 Pollock and Maitland, *History of English Law*, 174; Maitland, *Equity and Forms of Action*, 355, 356. By the Common Law Procedure Act of 1854 the plaintiff is entitled to delivery of the detained chattel.

<sup>55</sup> *Jones v. Dowle* (1841), 9 M. & W. 19; *Wilkinson v. Verity* (1871), L. R. 6 C. P. 206; *Walker v. Fenner* (1852), 20 Ala. 192.

<sup>56</sup> *Caldwell v. Fenwick*, 2 Dana (Ky.) 32, distinguishing *Carrel v. Early*, 4 Bibb (Ky.) 270, where the destruction occurred while

due tenderness for a wrongdoer and cannot properly be used as the basis of a generalization as to the law in this country.

In detinue, as in debt on a simple contract, defendant might defeat plaintiff's claim by successfully waging and making his law, until 1833. Thereafter, of course, trial was normally by jury.

**Covenant.** No writ for this action is given by Glanvill; but as early as 1201, if not 1194, the action appears in the plea rolls,<sup>57</sup> and the first register of writs (1227) contains the writ.<sup>58</sup> The action was certainly in common use toward the end of Henry III's reign (1216-1272). Nearly all the early cases have to do with agreements (*conventiones*) concerning land or concerning those incorporeal things which the medieval courts conceived to be, like land, capable of seisin. They are chiefly of three main classes.<sup>59</sup> (1) Actions to enforce the terms of a lease of land for years. Pollock and Maitland say covenant was invented principally for this purpose. The lessee was regarded as having no interest in the land, but by the use of this action he could secure specific performance of the lessor's agreement. (2) Actions brought merely that they may terminate in a compromise—usually called a final concord or a fine—which amounted in fact to a conveyance by one of the parties to the other with the approval of the court. (3) Actions to enforce covenants for refeoffment, made in the course of family settlements by way of feoffment and refeoffment. There was, however, nothing in the nature of the writ or of the action to confine it to so narrow a field. That this was recognized is shown by the recital in the Statute of Wales (1284) of the impossibility of mentioning by name each of the infinite number of enforceable covenants. But there was a notable exception. The more ancient action of debt lay to recover a sum of money promised to be paid by defendant in a writing under his seal. This seems to

the action was pending; *Lindsey v. Perry* (1840), 1 Ala. 203. But see Ames, *Lectures on Legal History*, 72.

<sup>57</sup> 2 Pollock and Maitland, *History of English Law*, 216, especially n. 2.

<sup>58</sup> Maitland, *History of Register of Original Writs*, 3 Harv. L. Rev. 97, 110, 113.

<sup>59</sup> 2 Pollock and Maitland, *History of English Law*, 217.



have been deemed a sufficient reason for denying such a promisee the action of covenant until near the opening of the seventeenth century.<sup>60</sup> Nor in the beginning was there any requirement that the *conventio* or agreement should be under seal. Indeed the term for years, for the protection of which the action was probably devised, could be created without writing or seal. But before the end of the reign of Edward I a covenant had come to mean a promise in writing under the seal of the covenantor, and the action of covenant lay only by the covenantee against the covenantor for breach of such a promise.<sup>61</sup>

From the ancient precedents in which the judgment required the covenantor to convey or let land pursuant to the terms of his covenant, developed the action of covenant real—a so-called real action.<sup>62</sup> But when the modern action of covenant is spoken of, the personal action is meant, in which the plaintiff may recover damages for the breach of any enforceable promise made to him by defendant in writing under defendant's seal.

During the thirteenth century the defendant who denied an alleged breach of covenant might wage his law.<sup>63</sup> But this mode of trial in this action did not persist until modern times as it did in debt and detinue; and it seems not to have been used even in early times when the defendant denied that he had executed the covenant.

**Annuity.** The writ of annuity, similar in form to that in debt,<sup>64</sup> first appears in the register of writs which Maitland believed to have been compiled in the middle of the reign of Henry III, probably between 1236 and 1259.<sup>65</sup> The medieval lawyers seem to have had some difficulty in handling an annuity which was not a rent, and it was only slowly that it came to be conceived of as a contractual obligation.

<sup>60</sup> Ames, *Lectures on Legal History*, 152; Anonymous (1585), 3 Leon 119; *Stronge v. Watts* (1610), 1 Rolle's Abr. 518 (B) 2.

<sup>61</sup> 2 Pollock and Maitland, *History of English Law*, 219-226.

<sup>62</sup> Maitland, *Equity and Forms of Action*, 358, 371.

<sup>63</sup> 2 Pollock and Maitland, *History of English Law*, 634. Query, whether this mode of trial long endured after covenant was restricted to violations of a sealed promise.

<sup>64</sup> Fitzherbert, *Natura Brevium*, 357.

<sup>65</sup> Maitland, *History of the Register of Original Writs*, 3 Harv. L. Rev. 169, 173, 177.

After the merely contractual nature of the obligation was realized, the action of annuity gradually fell into disuse. It was occasionally used in the eighteenth century<sup>66</sup> but Mr. Tidd as early as 1803 was able truthfully to say: "This action is at present out of use, being superseded by the action of debt or covenant."<sup>67</sup> Its influence on the later law has been so slight that it merits no further treatment here.

**Account.** The writ in this action was similar to that in debt and in detinue, and commanded the defendant to render an account to the plaintiff. The first register of writs to contain it is that in which the writ of annuity also makes its original appearance;<sup>68</sup> and the first reported ease of its use occurred in 1232.<sup>69</sup> It was probably devised to give the lord of a manor an adequate remedy against his bailiff, who had received rents and made expenditures for him. It lay also at an early date against a factor who had bought and sold goods for his principal, and by one merchant against another with whom he had entered into a joint adventure. It was extended by statute and judicial decision to require accounting by guardians, executors, administrators, joint tenants and tenants in common; persons whose relationship to the plaintiff required or authorized them to make collections and disbursements on his behalf.

"Another form of the action of account existed where the defendant was charged simply as a receiver of so much money for the use of the plaintiff by the hands of a third person. Originally that was the only remedy where A delivered money to B for C.<sup>70</sup> . . . The form of the writ against a general receiver charged that money had been received for the use of the plaintiff. Twenty-five cases where that phrase is used, running back to Edward the First and coming down to the last century, have been found."<sup>71</sup>

Here there was no requirement that the receipt by B should have been by authorization of C. All that was necessary was that A

<sup>66</sup> See e. g., *Hope v. Colman* (1764), 2 Wils. 221.

<sup>67</sup> 1 Tidd, *Practice of the Court of King's Bench* (2 Am. ed.), \*4.

<sup>68</sup> See note 51, *supra*.

<sup>69</sup> 2 Pollock and Maitland, *History of English Law*, 221.

<sup>70</sup> Ames, *Lectures on Legal History*, 117.

<sup>71</sup> *Id.* 118.

should have given and B should have received the money for C's use.

The procedure in account was unusual. The first issue to be tried was whether defendant was under a duty to account to plaintiff. If this was decided in favor of defendant, he was entitled to final judgment; if in favor of plaintiff, the judgment was that defendant do account. Then auditors were appointed before whom the parties must frame their issues and offer their evidence as to the state of accounts between them. If the accounts, when properly submitted and analyzed, showed a balance in plaintiff's favor, he recovered judgment for that balance; if they showed no balance either way or a balance in favor of defendant, the defendant was dismissed with his costs, but he could not get judgment for any sum proved to be due him. Furthermore, the defendant was privileged to wage his law on some issues. This dilatory, cumbersome and expensive method of proceeding caused litigants in later times to resort to the bill in equity for an accounting where the accounts were complicated, and to debt or assumpsit in the simpler cases. For this reason the action of account is rarely found after the beginning of the nineteenth century.<sup>72</sup>

✓ **Trespass.** Historians do not agree as to the origin of the action; but some things are made clear by authorities now available in print. (1) The writ is not given by Glanvill, nor does it appear in the registers of writs compiled before the reign of Edward I.<sup>73</sup> (2) At the opening of the thirteenth century litigants were bringing appeals for injuries for which in later days they would bring trespass, although in the appeal they could be awarded no compensation but could secure only the punishment of the wrongdoer. (3) In the early years of the reign of Henry III, when writs were being freely manufactured, occa-

<sup>72</sup> See 2 Pollock and Maitland, *History of English Law*, 221-222; Maitland, *Equity and Forms of Action*, 357-358; Ames, *Lectures on Legal History*, 117-121; 1 Selwyn, *Nisi Prius* (Am. ed., 1881), 1-9; 1 Tidd, *Practice of the Court of King's Bench* (2 Am. ed.), 1; Langdell, *Brief Survey of Equity Jurisdiction*, 74-98; 3 Blackstone, *Commentaries* (13 ed.), 347-348; 1 Holdsworth, *History of English Law* (3 ed.), 307-308.

<sup>73</sup> Maitland, *History of Register of Original Writs*, 3 *Harv. L. Rev.* 213, 217.

sionally trespassory wrongs were remedied by writs issued on the facts of the special case and, after the first third of the thirteenth century, some of these writs very closely resembled the later writs of trespass. (4) Shortly after 1250 the action was in common use and seems to have become a writ of course, for the Provisions of Oxford (1258) had no restrictive effect upon it. But for some time the limits of the action were not distinctly defined. The word trespass (*transgressio*) had not yet acquired an exclusively technical signification, and many a case of this period, usually classified as trespass, is practically indistinguishable from earlier cases wherein the writs were issued on the special facts thereof. (5) Whatever may have been the source or sources from which it was derived, it came in response to an insistent demand, for the cases show litigants and courts during all the first half of the thirteenth century groping about for such an action.<sup>74</sup>

The jurisdiction of the royal courts was founded upon the fact that the wrong done involved a breach of the king's peace. The writ and declaration averred that defendant's act had been committed *vi et armis et contra pacem Domini Regis*—with force and arms and against the peace of the Lord King. Originally, it seems reasonable to believe, the force and breach of peace were required to be proved as well as alleged. Such was the case, Professor Maitland thought,<sup>75</sup> in Henry III's day, though even

<sup>74</sup> See the following cases as illustrative of the assertions in the text. *Evesham v. Gifford* (1198), 1 Curia Regis Rolls 63 (appeal); *Lamburn v. Danmartin* (1194), 14 Pipe Roll Soc. 24; *Rande v. Malfe* (1199), 2 Rot. Cur. Reg. 120 (begun as action for damages: defendant raises issue of title and puts himself on grand assize. Case compromised); *Baggotorr v. Morel* (1220), Br. N. B. pl. 85; *Freston v. Eutropson* (1221), id. pl. 1520; *Stowe v. Mesners* (1222), id. pl. 194; *Iveson v. Bray* (1226), id. pl. 1735; *Abbot of Weybridge v. Gravele* (1234), id. pl. 835; *Teuton v. Chaggeford* (1234), id. pl. 1121; *Beauchamp v. Prior of Kenilworthe* (1237), *Abbrevio Placitorum* 105a; *Seroty v. Muncelyn* (1241), id. 107a; *Valence v. Wrennockson* (1253), id. 129a. By far the most satisfactory account of trespass that has yet appeared is that of Professor George E. Woodbine in 33 Yale L. J. 799-816 (1924), 34 id. 343-370 (1925). It was convincing to that distinguished scholar, the late Professor George B. Adams. Plucknett agrees with Woodbine that the action developed from the earlier "quare" writs, each granted on the special case, but disagrees as to its connection with the assize of novel disseisin. Plucknett, *Concise History of the Common Law* (2 ed. 1936) 329-332.

<sup>75</sup> Maitland, *Equity and Forms of Action*, 343-344.

then very slight violence would suffice. In later times neither violence nor breach of the peace had to be proved. In the modern action it was necessary to show only a direct and immediate injury to plaintiff's person or to his corporeal property by the wrongful act of defendant. When brought for injury to plaintiff's person, it was called trespass in assault and battery; for injury to his land, trespass *quare clausum fregit* or *de clauso fracto*; for carrying away his chattels, trespass *de bonis asportatis*; when brought for other wrongs, it was given no special name.

Real property was sufficiently plaintiff's to support the action when he was in possession of it at the time of such injury. His possession, even though unjustifiable as against the true owner, was enough as against others. On the other hand, even if he were the owner and entitled to the immediate possession of the invaded land and yet were out of possession when the injury was inflicted, he could not ordinarily recover in trespass. The landlord of a tenant at will or at sufferance, however, could maintain the action against a stranger for intrusion<sup>76</sup> and against his tenant at will for waste in cutting down trees.<sup>77</sup> From the early part of the fourteenth century a bailor could maintain trespass for such an injury by a stranger to a chattel in the hands of his bailee at will.<sup>78</sup> And it is probable that from a comparatively early date a person in a position strictly analogous to that of a bailor at will had the same remedy. If A was entitled to the immediate possession of a chattel held by B in acknowledged subordination to him, and C stole the chattel from B, doubtless A could maintain trespass against C. None of the early authori-

<sup>76</sup> Ames, Lectures on Legal History, 228. Ames cites cases from Maine and Massachusetts to the effect that the landlord must show damages, not merely a bare entry.

<sup>77</sup> Anonymous (1587), Saville 84; Tobey v. Webster (1808), 3 Johns. (N. Y.) 468. The reason stated in Saville is that there is no action of waste against a tenant at will, and the tenant has no "loyal possession" of the trees "*al intent del succider.*" In the United States a number of jurisdictions held that "where there is no adverse possession, the title draws with it constructive possession, so as to sustain the action of trespass." Gillespie v. Dew (1827), 1 Stew. (Ala.) 229, 230. Ames states this as the general rule in this country. See Ames, Lectures on Legal History, 229 and cases cited in his note 5.

<sup>78</sup> Ames, Lectures on Legal History, 58.

ties would allow A to maintain the action against C where B obtained the goods from A by trespass and C in turn stole them from B,<sup>79</sup> and this rule seems to have persisted to modern times, but Chitty states the law to be otherwise.<sup>80</sup> It is generally said that the action did not lie for an injury to an interest in, or a right of a person with respect to, an incorporeal thing. Thus it was not maintainable for slander, libel, malicious prosecution or interference with a franchise or easement. On the other hand, there is no question that it lay for assault without a battery; for false imprisonment; for loss of services to a master caused by beating his servant;<sup>81</sup> and for interference with a fishery or an exclusive right of profit.<sup>82</sup>

From the beginning the method of trial was by jury, though a stray case of trial by compurgation has been found.<sup>83</sup> The successful plaintiff recovered damages for the injury, and the defeated defendant was fined or imprisoned. This came to be regarded as a punishment for his breach of the king's peace. As actual breach of the peace ceased to be an element of the action, the fine and imprisonment became obsolete. They were formally done away with in 1694.<sup>84</sup>

**Case, or Trespass on the Case.** The provisions of Oxford placed an arbitrary limit upon the power of Chancery to create new writs. But legislation could not check the demand for new remedies, and it took less than a generation to demonstrate the inadequacy of existing forms of action to meet the needs of litigants. Accordingly in 1285 the statute of Westminster II provided: "Whensoever from henceforth it shall fortune in the

<sup>79</sup> Id. 57, n. 6, 61; 2 Pollock and Maitland, *History of English Law*, 166-168. Ames seeks to explain this result on the theory that a thief secured in a chattel an interest similar to that which a disseisor secured in land, and that the owner apparently had left only an action against him. Pollock and Maitland think the result an historical accident.

<sup>80</sup> See Bordwell, *Property in Chattels*, 29 *Harv. L. Rev.* 374 (1916); 1 Chitty, *Pleading* (7 Am. ed. 1844) 192; *Cox v. Hall and Burt*, 18 *Vt.* 191, 192, 194 (1846), applying Chitty's view. Chitty seems to rely solely upon a note in *Wilbraham v. Snow*, *Sidexfin*, 438 (K. B. 1682).

<sup>81</sup> *Ditcham v. Bond*, 2 *Maule & Selwyn* 436 (1814).

<sup>82</sup> See *Y. B. 2 Henry IV.* 11, 48 (1401); Pollock, *Torts* (11 ed.) 380; Whittier and Morgan, *Cases on Common Law Pleading*, 12, n. 12.

<sup>83</sup> 2 Pollock and Maitland, *History of English Law*, 634.

<sup>84</sup> Statute 5 and 6 Wm. & M., ch. 12.

Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy (*in consimili casu cadente sub eodem jure et simili indigente remedio*) is found none, the clerks of the Chancery shall agree in making the writ; or adjourn the plaintiffs until the next Parliament, and let the eases be written in which they cannot agree, and let them refer them until the next Parliament, and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants."<sup>85</sup> This enactment authorized Chancery to renew its former practice of issuing writs to fit the facts of the special case, with this limitation, that the new writ must be *in consimili casu* with an existing writ of course. The orthodox view is that the action of trespass on the case owes its origin to this statute. Prior to 1925 Professor George E. Woodbine, after a thorough search of the available authorities, concluded that the courts had made no use of this provision except in expanding the scope of writs of entry.<sup>86</sup> In 1931 Professor Plucknett developed this thesis in an article in the *Columbia Law Review*,<sup>87</sup> but Holdsworth and others refused to abandon the generally accepted theory.<sup>88</sup> Recent investigation has produced very persuasive evidence that the orthodox doctrine originated with legal writers of the sixteenth and seventeenth centuries, and that the action evolved by judicial rather than legislative process from the action of trespass, the courts recognizing a writ in trespass upon the plaintiff's case or matter as a branch of trespass distinguishable from trespass *vi et armis*.<sup>89</sup> The undisputed fact is that the records and re-

<sup>85</sup> Maitland, *Equity and Forms of Action*, 345.

<sup>86</sup> In a note in the first edition of this book, published in 1926, it is said: "Professor George E. Woodbine of the Yale Law School has made a thorough search of available cases upon this point. He is authority for the statement that the courts seem to have made no conscious use of this statutory provision except in writs of entry for a long period after 1285. The finding of this eminent legal historian is unhesitatingly accepted." P. 77, n. 71.

<sup>87</sup> Case and the Statute of Westminster II, 31 *Columbia L. Rev.* 778 (1931).

<sup>88</sup> 47 *L. Q. Rev.* 334 (1931); Landon, *The Action on the Case and the Statute of Westminster II*, 52 *id.* 220 (1936).

<sup>89</sup> Dix, *The Origins of the Action of Trespass on the Case*, 46 *Yale L. J.* 1142 (1937).

ports during the century following 1285 show many writs, classified as trespass, where no violence or breach of the peace is involved and some where neither is even alleged. Gradually the realization came that a new and flexible form of action had been evolved. The line of demarcation between it and trespass was not clear or sharp, but certain procedural differences inevitably developed. If there was no force or breach of the peace, the defendant should not be treated as if he had committed an offense against the king. And by the beginning of the sixteenth century legislators and legal writers, as well as courts and lawyers, recognized that there was a form of action of trespass on the case, or case, distinct from the action of trespass.

As Professor Maitland puts it, case became "a sort of general residuary action."<sup>90</sup> It lay for indirect or consequential injuries to the person, goods or lands of the plaintiff by the wrongful act or neglect of defendant. As the defendant who threw a log against the plaintiff must respond in trespass, so the defendant who wrongfully left a log lying in the highway so that plaintiff stumbled over it was responsible in case. He who maintained a nuisance on his own property to the injury of the health of the plaintiff, his neighbor; he who unjustifiably allowed noxious fumes to escape from his factory and damage plaintiff's trees, shrubbery or growing crops, exposed himself to an action on the case. It was maintainable also for injuries to reversionary interests, such, for example, as the interest of the owner of land in possession of a tenant for years, or that of a bailor of a chattel bailed for a definite term. It could be properly brought too for injuries to rights in incorporeal things as, for instance, for wrongful interference with an easement, for libel, slander and malicious prosecution. So general was its application that Stephen went so far as to say that it lay where a party sued for damages for any wrong or cause of complaint to which covenant or trespass would not apply.<sup>91</sup> This statement is probably too broad; but it is doubtless true that the action on the case did make feasible a salutary expansion of the common law.

**Assumpsit.** Debt, detinue, covenant and account afforded no remedy for breach of an unsealed promise, and there are numer-

<sup>90</sup> Maitland, *Equity and Forms of Action*, 361.

<sup>91</sup> Stephen, *Pleading* (Williston's ed.), \*16, 17.



ous decisions in the 1400s that no action lies upon such an undertaking.<sup>92</sup> But in the sixteenth century and thereafter actions on the case for broken promises, or actions of *assumpsit*, are common. How did the change come about? If B cut C with a razor without C's consent, C had an action of trespass against him; if he did it with C's consent for a legitimate purpose, obviously C had no action at all; but if he undertook to shave C skillfully and did the work so carelessly as to cut him, he thereby wrongfully applied physical force directly to C's person. This was exactly the situation where C was entitled to a writ in *consimili casu* with trespass. B was liable in trespass on the case, and it was his undertaking that made him responsible. The writ and declaration therefore alleged that B undertook (*assumpsit*) to do the shaving skillfully.<sup>93</sup> In like manner, where B promised to deal skillfully with C's property and handled it so unskillfully as to injure it, he had to respond in damages in trespass on the case.<sup>94</sup> Again, where a bailee, who had expressly promised to keep the goods entrusted to him with care and skill, negligently or improperly kept them, he was guilty of active interference with the bailor's chattels, analogous to a trespass, and from the latter part of the fifteenth century onward the bailor could secure damages therefor in an action on the case. Here too the bailee's *assumpsit* was a necessary element of bailor's cause. Furthermore, when seller sold goods to buyer with a false express warranty, the courts of the fifteenth century looked upon his action not as a breach of contract but as a tort—a deceit. Seller was not violating a promise, he was misrepresenting an existing fact. The sale with a false warranty was active misconduct for which trespass on the case for deceit would lie. Here then were three classes of cases wherein a writ of trespass on the case would issue and wherein breach of the undertaking by affirmative misconduct was of the essence of the action. Now, suppose that S promised to sell to B and, in violation of that promise, sold to C. Was not his sale to C active misconduct in breach of an undertaking? was it not a deceit? and should there not be a remedy against him as against the careless barber,

<sup>92</sup> For a full discussion of the history and development of this action, see Ames, *Lectures on Legal History*, 129-166.

<sup>93</sup> *Id.* 130, n. 4.

<sup>94</sup> *Id.* 130, nn. 1, 3, 5.

the negligent bailee and the false warrantor? Litigants in the fifteenth century frequently believed so, strongly enough to try it out, and before the opening of the sixteenth century they had convinced the courts that they were right. But one step remained to be taken. In all these cases the promisor's misconduct was positive—a misfeasance. If he merely failed to act, if by nonfeasance he violated his promise, all the earlier cases said no writ could issue. But in view of the facts that the promisor was as blameworthy and the damage to the promisee was as great in one case as in the other, so thin a distinction could not long stand. And early in the sixteenth century it became established that for breach of an unsealed contract an action on the case would lie.<sup>95</sup> This action later split off from Case and became a separate formed action known as Assumpsit.<sup>96</sup>

For the breach of an unsealed promise the lawyers now had a formed action in which trial was by jury. They had before this come to realize that wager of law often afforded a dishonest defendant in the action of debt the means of evading a just obligation; and they were anxious to make this new action do the work of debt. However, assumpsit could not be brought upon the promise which created the debt, because that promise operated as a grant, and a formed action providing an adequate remedy made resort to an action on the case unnecessary. By the middle of the sixteenth century, however, if a debtor made a subsequent promise to pay the debt, assumpsit would lie upon that promise. In Elizabeth's reign the King's Bench took the step of implying the second promise, but the Court of Exchequer Chamber on review refused to approve any such innovation, and as late as 1601 required proof of an actual second promise.<sup>97</sup> In 1602 the question whether such a second promise was necessary was twice argued before all the Justices of England and Barons of the Exchequer.<sup>98</sup> The jury in an action of assumpsit found in a special verdict that there was a bargain and sale, "that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain." The defendant argued (1) that plaintiff's remedy was debt, "which is an

<sup>95</sup> *Id.* 139-143.

<sup>96</sup> Maitland, *Equity and Forms of Action*, 363.

<sup>97</sup> *Maylard v. Kester*, Moore 711 (1601).

<sup>98</sup> *Slade's Case*, 4 Coke 92 b.

action formed in the Register, and therefore he should not have an action on the case, which is an extraordinary action, and not limited within any certain form in the Register"; (2) that to allow *assumpsit* would take away from defendant the benefit of wager of law "and so bereaves him of the benefit which the law gives him, which is his birthright." The Justices and Barons held that the action was properly brought. "It was resolved, that every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay, or deliver it,<sup>99</sup> and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt. . . . It was said, that an action on the case on *assumpsit* is as well a formed action, and contained in the register, as an action of debt, for there is its form; also it appears in divers other cases in the register, that an action on the case will lie, although the plaintiff may have another formed action in the Register." Thereafter *assumpsit* lay to recover a simple contract debt.

For a long time the common law provided no remedy for the person who parted with his goods or rendered services to another under the reasonable expectation of receiving from him their reasonable value. Though the recipient by his conduct created in the other party the reasonable belief that he would pay what the goods or services were worth, that other could not bring debt because the sum was not fixed, nor *assumpsit* because there was no express promise. In the early part of the seventeenth century the courts took the reasonable step of construing the

<sup>99</sup> Ames seems to disagree with the view that this refers to an implied promise, i. e., one created by law, to pay the debt. "Inasmuch as the judges . . . were working out a promise from words of agreement which had hitherto been conceived of as sounding only in grant, it was not unnatural that they should speak of the promise thus evolved as an 'implied *assumpsit*.' But the promise was in no sense a fiction." Ames, *Lectures on Legal History*, at 152. The declaration in general *assumpsit*, however, always alleges that the defendant, being indebted, promised to pay the amount of the indebtedness, and no one doubts that this promise is fictional.

recipient's conduct as a promise to pay and allowing assumpsit to be brought for breach of this promise.<sup>1</sup> It was said that the law implied the promise.

Between the years 1673 and 1705, by the device of creating promises by implication of law, assumpsit was made available for the enforcement of quasi-contractual obligations. That is to say, wherever in the opinion of the courts, the law created an obligation on the part of defendant to pay money to plaintiff, the latter might maintain assumpsit. The declaration contained an allegation of a promise by defendant to pay, but no proof of it was required.<sup>2</sup>

When the action was brought for the breach of an express promise, it was called Special Assumpsit; when brought to collect a simple contract debt, or for the reasonable value of goods or services, or to enforce a quasi-contractual obligation, it was called General or Indebitatus Assumpsit.

**Trover.** Replevin, detinue and trespass *de bonis asportatis* did not, separately or in combination, furnish adequate relief for wrongful dealing with chattels. Replevin lay only for a taking as distinguished from acceptance of delivery from one having possession. Trespass gave no remedy for damage or tortious transfer by the bailee of the bailed goods.<sup>3</sup> Detinue had at least two serious defects: (1) The defendant had the privilege of waging his law. (2) He had the option of returning the chattel or paying its assessed value; and if the chattel were damaged, he was likely to return it. At the very least, an action of trespass in *consilimi casu* with detinue was needed, and to meet this need the action of trover was developed. It began to emerge as an action separate from trespass on the case about the middle of the sixteenth century. It lay, like *detinue sur trover*, upon a finding by defendant and a refusal by him to deliver to the plaintiff. Its elements are well stated in the following quotation:

“The classic count in trover alleges (1) that the plaintiff was possessed, as of his own property, of a certain chattel;

<sup>1</sup> Id. 154-159.

<sup>2</sup> Id. 160-166. See *Moses v. Macferlan*, 2 Burr. 1005 (K. B. 1760).

<sup>3</sup> But it seems that trespass lay against a bailee who wilfully destroyed the goods.

(2) that he afterwards casually lost it; (3) that it came to the possession of the defendant by finding; (4) that the defendant refused to deliver it to the plaintiff on request; and (5) that he converted it to his own use, to the plaintiff's damage."<sup>4</sup>

No doubt each of these allegations was originally required to be proved as alleged. But as time went on, the scope of the action was expanded to meet new situations. Allegations once regarded as matter of substance were later held to be mere matter of form. The losing and finding need not be proved. In England and the overwhelming majority of American jurisdictions the plaintiff's right to immediate possession is sufficient if superior to that of the defendant. In the usual case demand and refusal are no part of plaintiff's case. And if defendant exercises dominion over the chattel for the purpose of destroying it or devoting it to the use of a stranger, to the exclusion of the plaintiff, he is just as responsible in trover as if he had exercised such dominion for his own use and benefit. Thus of the five allegations plaintiff must generally prove none literally; he must make a qualified showing of the first and last. The gist of the action is conversion.

**Ejectment.** In the last years of the twelfth century and the first third of the thirteenth century a lessee for years who was wrongfully ejected by his lessor might bring an action of covenant and secure damages for the ouster and restoration of his term. But as against others than his lessor he had no remedy. William Raleigh, a royal justice whose judicial career ended in 1239,<sup>5</sup> is credited with having invented a writ which Bracton believed ought to give the termor (i. e., the lessee), the same relief against other ejectors as covenant gave against the lessor.<sup>6</sup> But it soon became established that this writ *quare ejecit infra terminum* was available only against an ejector who was claiming

<sup>4</sup> Ames, History of Trover, 11 Harv. L. Rev. 277. A full account of the history and development of this action is found in this article 11 id. 277-289, 374-386. See also 3 Street, Foundations of Legal Liability, 159-171.

<sup>5</sup> Maitland, History of Register of Original Writs, 3 Harv. L. Rev. 175.

<sup>6</sup> Bracton, De Legibus et Consuetudinibus Angliae, folio 220.

under the termor's lessor. Now, while a termor had not that sort of possession which the medieval courts called seisin, yet he had sufficient possession to maintain an action of trespass *quare clausum fregit* against strangers who intruded and, before the end of the fifteenth century, even against his lessor who wrongfully entered. The writ of trespass *de ejectione firmæ* required the defendant to answer why with force and arms and against the peace he had entered the land and ejected the plaintiff. As in other actions of trespass, the plaintiff could recover only damages. During the fifteenth century efforts were made to expand the action, so that the termor might have against strangers who ejected him as adequate a remedy as he had under covenant and *quare ejecit* against his lessor and those claiming under the lessor. And before the beginning of the sixteenth century it was finally settled that though neither the writ nor the declaration contemplated such relief, the court would award the successful plaintiff restoration of his term and order the sheriff to put him back in possession.<sup>7</sup>

Obviously the plaintiff would not be entitled to be repossessed of the land unless his lessor had a sufficient title to support the lease. Consequently, if defendant denied the lessor's title, plaintiff would have to establish it. The result was that in a personal action title to real estate was incidentally tried. Herein the lawyers saw an opportunity to secure the trial of title to realty without the expense and delay of the old real actions and to secure repossession without risk of the narrow technicalities of the possessory assizes. To enable the claimant out of possession to try out his title and right to immediate possession of land in the occupancy of another it was necessary only to put him in the position of a lessor. Accordingly the following procedure was followed. The claimant C entered upon the land, thereby taking possession, and then and there delivered to a friend L, a lease for years, and left L upon the premises. L remained there until O, the occupant, appeared and ejected him. L thereafter brought trespass *de ejectione firmæ* against O. He could readily

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<sup>7</sup> Maitland, *Equity and Forms of Action*, 350. See Ames, *Lectures on Legal History*, 223: "The conversion of *ejectio firmæ* from a personal to a mixed action was effected by the common law to prevent the competition of the jurisdiction of equity. For lessees had begun to resort to equity for specific performance by the lessor and for injunction against strangers."

prove C's entry upon and possession of the land, the lease then and there delivered to L by C, that is, L's entry under the lease, and the ejectment of L by O, and the only real issue was C's title. If L won, he was put in possession of the land, and later surrendered it to C. Because it was frequently inconvenient or dangerous for L to remain upon the premises until O appeared and threw him off, it became customary for C to take with him not only L but E. As soon as C had delivered the lease to L and left him in possession, E would eject him. L would then bring his action against E, the casual ejector. By this device L might get judgment for repossession without O's having any knowledge of the action or opportunity to resist C's claim. To avoid this outrageous result, the court required O to be given notice and opportunity to defend.

Although the entry by C, his lease to L, and L's ejectment by E were mere formalities and had nothing to do with the real question at issue, they had to be proved if denied; and since they had to be proved, it was essential that they should have actually happened. Under Chief Justice Rolle (1649-1660) this useless performance was made unnecessary. C made no entry and executed no lease to L, and E did no ejecting. C, in the name of L, made his declaration in ejectment against E in the usual form, and to it he appended a notice directed to O and signed in E's name, informing O of the pendency of the action, stating that E had no title and intended to make no defense and telling O to apply to the court for permission to defend; otherwise, he would be turned out of possession. The declaration and notice were delivered to O. If he did not apply for leave to defend, judgment went against E by default, and C was put in possession. If O did apply for leave to defend, it was granted to him only upon condition that he admit C's entry and consequent possession,<sup>8</sup> the lease to L and L's entry thereunder and the ouster of L by E,<sup>9</sup> and take issue only upon the title of C. Later L and E

<sup>8</sup> Perry, *Common Law Pleading*, 98, n. 1.

<sup>9</sup> This admission was made by entering into the so-called consent rule. There was a conflict between the holdings of the Court of Common Pleas and those of the Court of King's Bench as to whether this included an admission that O was in possession of the land. See Goodright *dem.* Balch v. Rich, 7 Term Rep. 327 (1797). The form of the consent rule in the King's Bench was changed in 1820 so as to describe accurately the land as to which O sought leave to defend.

came to be only fictitious persons, the familiar John Doe and Richard Roe or the suggestive John Fairelaim and Richard Shamtitle. And so the action remained until modern times. At present all its fictions have been done away with by legislation, and C may bring a direct action against O.<sup>10</sup>

The action lies only by a plaintiff out of possession against a defendant in possession. It does not lie by a plaintiff out of possession against the lessor of a tenant in possession to determine whether plaintiff is entitled to receive the rent under the lease;<sup>11</sup> nor against any other defendant out of possession.<sup>12</sup> Consequently it lies only for corporeal realty and not for such intangible interests as easements.<sup>13</sup> Although it is frequently said that plaintiff must recover upon the strength of his own title and not on the weakness of his adversary's, the prevailing view is that mere prior possession is sufficient against a mere wrongdoer.<sup>14</sup>

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<sup>10</sup> See Maitland, *Equity and Forms of Action*, 347-355; Perry, *Common Law Pleading*, 93-99; 3 *Blackstone Commentaries* (10 ed.), 199.

<sup>11</sup> *Doe v. Wharton* (1798), 8 Term Rep. 2.

<sup>12</sup> *Goodright v. Rich* (1797), 7 Durn. & E. 327; Whittier and Morgan, *Cases on Common Law Pleading*, 59 and note 16.

<sup>13</sup> *Smith v. Wiggim* (1868), 48 N. H. 105.

<sup>14</sup> *Casey v. Kimmel* (1899), 181 Ill. 154, 54 N. E. 905; Whittier and Morgan, *Cases on Common Law Pleading*, 55 and note 10.



## CHAPTER VI

### PLEADINGS

#### I. AT COMMON LAW

**In General.** At common law after the sheriff had duly served the writ of summons and the defendant had appeared before the royal judges as directed, the plaintiff had to make his claim known to the court and to the defendant in greater detail than was given in the writ, and the precise points in controversy between the plaintiff and defendant had to be made to appear. In the earlier period the practice was to have the plaintiff or his representative state orally what he claimed to be the facts upon which he based his demand for relief. This was done in very informal fashion. If the defendant took the position that plaintiff's statement, if true, was insufficient to warrant relief in the action, he merely said something like, "Judgment of that." If the judge agreed with defendant, he was likely to say to plaintiff, "Say something else." If he disagreed with defendant, his words directed to defendant would often be, "Say something." In this familiar fashion, the defendant challenged the legal sufficiency of plaintiff's statement, and the court ruled by either giving plaintiff the right to amend or the defendant the right to put in a response. Instead of challenging the sufficiency of plaintiff's statement, the defendant might deny its truth, or he might admit its truth and assert other facts which, as he contended, would make plaintiff's facts insufficient ground for recovery. To such an allegation of new facts the plaintiff would reply by a demand for judgment, or by a denial or by an allegation of new facts. This procedure was continued until the parties came to an issue either of law or of fact. If one party challenged the legal sufficiency of the other's statement and if after the court had ruled, the party against whom the ruling was made refused to allege additional facts, an issue of law was made. If the statements and counterstatements reached a stage where a party's assertion was met by a denial, an issue

of fact was made. These statements and responses were called pleadings.

At a later period the pleadings were required to be in writing. Plaintiff's first pleading in which he set forth his claim was called the Declaration; this was met on the facts by defendant's plea; the plea by plaintiff's replication; the replication by defendant's rejoinder; the rejoinder by plaintiff's surrejoinder; the surrejoinder by defendant's rebutter, and the rebutter by plaintiff's surrebutter. If further pleadings were necessary, they were nameless. In the action of replevin a defendant's response in which he justified the alleged wrongful taking and detaining of the chattel in his own right was called an avowry, a response in which he justified in the right of another was called a cognizance. Plaintiff's reply to an avowry or a cognizance was called a plea, the later pleadings had the usual names from replication to surrebutter. When one party challenged the legal sufficiency of another's pleading he was said to demur. When he demurred, the other party was required to join in demurrer, that is, to assert in effect in writing that his pleading was sufficient in law. This raised a question for decision by the court. When one party met the other's pleading by a denial and "put himself upon the country" (that is, demanded trial by jury), the latter had to interpose a joinder of issue or similitur. This was merely a statement that he too put himself upon the country.

After the introduction of written pleadings, the rules governing the form of statement became more and more complicated, and greater and greater importance was attached to departures from the rules.

The following examples will furnish sufficient information as to the function and content of the various pleadings to enable a student to understand the pleadings at common law in a reported case. They include only one example of joinder in demurrer and of joinder of issue.

#### OUTLINE AND EXAMPLES OF PLEADINGS

**Declaration.** A written statement of facts by plaintiff, which, as plaintiff contends, constitutes a cause of action in his favor against defendant.

## EXAMPLE—DECLARATION FOR TRESPASS TO REALTY

In the King's Bench. Hilary Term, 5 Geo. 4.

Middlesex, to wit. Peter Policeman was attached to answer Samuel Student of a plea of trespass wherefore (here would be recited a description of defendant's wrong similar to that stated below). And thereupon the said Samuel Student, by his attorney, Lewis Lawyer, complains against the said Peter Policeman. For that the said Peter Policeman on the ——— day of January in the year of our Lord 18—, with force and arms broke and entered a certain dwelling-house of the plaintiff situate and being in the parish of X in the County of Middlesex, and then made a great noise and disturbance therein, and then ejected, expelled, put out and amoved the plaintiff and his family from the possession, use, occupation and enjoyment of the said dwelling-house and kept and continued them so ejected, expelled, put out and amoved for a long space of time, to wit, from thence hitherto; whereby the plaintiff, for and during all that time, lost and was deprived of the use and benefit of his said last-mentioned dwelling house, to wit, at etc., aforesaid. And other wrongs to the plaintiff then did, against the peace of our said lord the now King and to the damage of the plaintiff of £100, and thereupon he brings suit, etc.<sup>1</sup>

The declaration is to be met by one of the following:<sup>2</sup>

**A. General Demurrer.** A statement, usually in writing, by defendant that plaintiff's declaration is insufficient in law, that is, that the facts alleged therein do not constitute a cause of action in favor of plaintiff against defendant.

<sup>1</sup> See 2 Chitty on Pleading (5 Am. ed., 1828) 864-865. For the forms hereafter set out no references are cited. They are adapted from the forms given in the earlier editions of Chitty and of Stephen on Pleading.

<sup>2</sup> No example of a dilatory pleading is given. A dilatory plea did not purport to answer the plaintiff's claim on the merits but set up some matter which challenged the jurisdiction of the court, or which showed that the action should be suspended or abated. Such a plea had to be interposed promptly, and before demurrer or plea to the merits.

## EXAMPLE

In the King's Bench. Hilary Term 5 Geo. 4.

Samuel Student

vs.

Peter Policeman

And the said Peter Policeman by Arthur Andrew his attorney comes and defends the force and injury, when and where it shall behove him, and says, that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said Samuel Student to have or maintain his aforesaid action thereof against him the said Peter Policeman and that he the said Peter Policeman is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the said Peter Policeman prays judgment, and that the said Samuel Student may be barred from having or maintaining his aforesaid action thereof against him.

To this plaintiff would have to interpose a joinder in demurrer.

## EXAMPLE

(Title as in General Demurrer.)

And the said Samuel Student saith that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law for him the said Samuel Student to have and maintain his aforesaid action thereof against him the said Peter Policeman, and the said Samuel Student is ready to verify and prove the same as the court here shall direct and award; wherefore inasmuch as the said Peter Policeman hath not answered the said declaration nor hitherto in any manner denied the same, the said Samuel Student prays judgment, and his damages by reason of the breaking and entering and other wrongs in the said declaration mentioned be adjudged to him, etc.

**B. Special Demurrer.** A statement usually in writing, by defendant that plaintiff's declaration is insufficient in substance

in failing to state facts sufficient to constitute a cause of action, and insufficient in form in certain designated particulars.

#### EXAMPLE

(Title as in General Demurrer.)

And the said Peter Policeman by Arthur Andrew his attorney comes and defends the force and injury, when and where it shall behove him, and says, that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said Samuel Student to have or maintain his aforesaid action thereof against him the said Peter Policeman and that he the said Peter Policeman is not bound by the law of the land to answer the same, and this he is ready to verify and prove the same as the court here shall direct and award; wherefore, for want of a sufficient declaration in this behalf, the said Peter Policeman prays judgment, and that the said Samuel Student may be barred from having or maintaining his aforesaid action thereof against him. And the said Peter Policeman according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said declaration, that is to say, for that the said close and dwelling-house, in which, etc., in the declaration mentioned are not designated or described in the said declaration either by name or abuttals or other description; and also for that it does not appear in or by said declaration where or in what parish or part of the said county the said close and dwelling-house in which, etc., were or are situate. And also that the declaration is in other respects uncertain, informal and insufficient.

**C. Plea of General Issue.** A written statement by defendant the phrasing and effect of which varies with the form of action. In Trespass, Case and Trover the brief name for it is Not Guilty; in Assumpsit, Non-assumpsit; in Debt, other than Debt on a bond or on a record, Nil debet; in Debt on a record, Nul tiel record. Non cepit in Replevin, Non detinet in Detinue, and Non est factum in Covenant and in Debt on a bond are

usually called pleas of general issue, but they are hardly broad enough to deserve the name.

The General Issue was sometimes called a General Traverse, but it served as more than a denial of the material allegations of the declaration in some instances and as less in others. Before the Hilary Rules of 1834 the scope of the general issue in the various personal actions was as follows:

*Replevin.* The plea, *non cepit*, denied the taking and the place of taking, and put the plaintiff to the proof of these allegations only. It did not deny plaintiff's property in the chattel.

*Detinue.* The plea, *non detinet*, denied the plaintiff's allegation of property in the chattel and its detention by defendant, and put only these allegations in issue.

*Debt, other than on a bond or record.* The plea, *nil debet*, denied defendant's indebtedness to plaintiff at the time of bringing the action. Consequently evidence of any defense which showed nothing to be due from defendant to plaintiff at that time, whether by way of denial, excuse or discharge, was admissible under this plea. Chitty says that the better practice required that the defense that the statutory period of limitations had expired be pleaded specially, and that tender was inadmissible under *nil debet*.<sup>3</sup>

*Debt on a bond.* The plea, *non est factum*, denied that the instrument sued on was defendant's deed, that is, that he had executed the instrument, or that the instrument had any validity as his deed. Thus if his signature and seal were put on the instrument under such circumstances as to make it void, he could avail himself of this defense under this plea, but not if the circumstances made it merely voidable by him.

*Debt on a record.* The plea, *nul tiel record*, put in issue only the existence of the record as alleged.

*Covenant.* The plea, *non est factum*, had the same effect as in debt on a bond.

*Trespass.* The plea, *not guilty*, denied the essential allegations of the declaration. In trespass to the person it put in issue the commission of the act charged by the defendant to the person of the plaintiff. In trespass to personalty or realty, it challenged also plaintiff's requisite interest in the chattel or realty. If defendant relied upon his superior right to realty of

<sup>3</sup> 1 Chitty, Pleading (2 Am. ed., 1812) 476.

which plaintiff was in possession, it was usual for him to plead it specially. See F, *infra*.

*Case.* The plea, *not guilty*, permitted defendant to show any defense by way of denial, excuse or discharge except the statute of limitations and except truth in an action on the case for slander or libel.

*Assumpsit.* The plea, *non assumpsit*, was interpreted to be wide enough to admit any defense which showed that the defendant had not become legally liable for a breach of the alleged promise, that is, any defense by way of denial of the promise or breach or by way of excuse for the breach. Matters which assumed that plaintiff once had a cause of action on the promise but that it had been discharged had, by the rulings in the earlier cases, to be pleaded specially. Later the effect of the plea was enlarged, first in general assumpsit and finally in special assumpsit, so that matter in discharge was admissible under it. Consequently almost any matter in defense might be proved under non assumpsit, except the statute of limitations, a discharge in bankruptcy, or tender.

*Trover.* The plea, *not guilty*, was as broad as that in *Case*. It included any defense except the statute of limitations.

*Ejectment.* As shown in the chapter on forms of action, the plea, *not guilty*, was by rule of court under the Commonwealth, limited so that it put in issue only the title of the plaintiff's lessor (the real plaintiff), and for some time it was questionable whether it allowed the defense of lack of possession by the real defendant.

#### EXAMPLE

(Same title.)

And the said Peter Policeman by his attorney Arthur Andrew comes and defends the force and injury, when (and where it shall behove him, and the damages and all which he ought to defend,) <sup>4</sup> and says that the said Samuel Student ought not to have or maintain his aforesaid action against him because he says that he is not guilty of the said trespasses above laid to his charge or any part thereof, in

<sup>4</sup> At a later date but before the Hilary Rules of 1834, the matter in parenthesis was replaced by "etc." because regarded as merely formal.

manner and form as the said Samuel Student hath above complained against him the said Peter Policeman. And of this he puts himself upon the country.

This was met by a joinder of issue or similiter.

EXAMPLE

(Same title.)

And the said Samuel Student as to the said plea of the said Peter Policeman above pleaded and whereof he hath put himself upon the country doth the like.

**D. Plea of Common Traverse or Specific Traverse.** A written statement expressly denying a material allegation of plaintiff's declaration, usually in the terms of the allegation. After the rule became established that the denial of any allegation of a declaration which might be put in issue by the general issue could not properly be made specially, there was no room for a plea of common traverse in Trespass. So no example of such a plea to the declaration above set out is given.

EXAMPLE

*Covenant; Common Traverse of breach for not repairing.*  
(Same title.)

And the said Peter Policeman by his attorney Arthur Andrew, comes and defends the wrong and injury when, etc.<sup>5</sup> and says that the said Samuel Student ought not to have or maintain his aforesaid action against him the said Peter Policeman because he says that the windows of the said messuage or tenement were not in any part thereof ruinous, in decay, or out of repair, in manner and form as the said Samuel Student hath above complained against him, the said Peter Policeman. And of this he puts himself upon the country.

**E. Plea of Special Traverse.** A written statement denying in an argumentative manner a material allegation of plaintiff's

<sup>5</sup> See example given in C, *supra*. Note that at times the phrase "force and injury" was used, and at times "wrong and injury." In the earlier practice "force and injury" was commonly used.



declaration followed by a direct denial of the same allegation. The direct denial is introduced by the phrase *absque hoc* (without this), or the phrase *et non* (and not). Like the common traverse it could not properly be used as a plea to a declaration in Trespass. Hence, an example in Replevin is given.

## EXAMPLE

*Special Traverse in Replevin—Property in Third Person.*  
(Same title.)

And the said Peter Policeman by his attorney, Arthur Andrew, comes and defends the wrong and injury when, etc. and says that the said Samuel Student ought not to have or maintain his aforesaid action against him the said Peter Policeman because he says that the goods and chattels in the said declaration mentioned at the said time when, etc., were the property of one William Smith (*absque hoc* that they were the property of the said Samuel Student, or) and not of the said Samuel Student, as by the said declaration is above alleged. And this the defendant is ready to verify; wherefore he prays judgment if the said Samuel Student ought to have or maintain his aforesaid action against him etc., and a return of the said goods and chattels together with his costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, etc.

(N. B. After the Hilary Rules of 1834 the defendant put himself on the country instead of offering to verify.)

**F. Plea in Confession and Avoidance.** A written statement by defendant admitting, either expressly or by failure to deny, the truth of the facts stated by plaintiff in his declaration, and setting up additional facts, which, as defendant contends, constitute an excuse of justification for the alleged wrong complained of by plaintiff, or a discharge of defendant from all liability therefor.

## EXAMPLE

*Liberum Tenementum—His own freehold.* (Same title.)

And the said Peter Policeman by his attorney Arthur Andrew comes and defends the force and injury, when (and where it shall behove him, and the damages and all which

he ought to defend), and says that the said Samuel Student ought not to have or maintain his aforesaid action against him because he says that the said dwelling-house in the said declaration mentioned, and in which, etc., now is, and at the said several times when, etc., was the dwelling-house and freehold of the said Peter Policeman, the defendant herein; wherefore the said Peter Policeman in his own right at the said several times when, etc., committed the said several alleged trespasses in the said declaration mentioned, in the said dwelling-house, in which, etc., so being the dwelling-house and freehold of him, the said Peter Policeman as he lawfully might for the cause aforesaid, which are the said several alleged trespasses whereof the said Samuel Student hath above thereof complained against him, the said Peter Policeman. And this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff, Samuel Student, ought to have or maintain his action against him, the said Peter Policeman.

**A Plea in Confession and Avoidance** is to be met by one of the following:

1. *General Demurrer.* A statement, usually in writing, by plaintiff that the defendant's plea is insufficient in law; that is, that the facts set up therein do not constitute a defense to the cause of action alleged in plaintiff's declaration.

The form is identical with that given in the first part of the special demurrer below.

2. *Special Demurrer.* A statement, usually in writing, by plaintiff that the defendant's plea is insufficient in law, that is, that defendant's plea does not allege facts constituting a defense to the cause of action set forth in plaintiff's declaration, and that it is defective in form in certain designated particulars.

EXAMPLE

(Same title.)

And the said Samuel Student, as to the said plea of the said Peter Policeman by him above pleaded, saith that the same and the matters therein contained in manner and form

as the same are above pleaded and set forth are not sufficient in law to bar or preclude him, the said Samuel Student, from having or maintaining his aforesaid action against the said Peter Policeman, and that he the said Samuel Student is not bound by the law of the land to answer the same. And this he is ready to verify; wherefore, by reason of the insufficiency of the said plea in this behalf, the said Samuel Student prays judgment and his damages by him sustained on the committing of the said trespasses, to be adjudged to him etc. And the said Samuel Student according to the form of the statute in such case made and provided, states and shows to the Court here the following causes of demurrer to the said plea, that is to say, that the said plea amounts to the general issue, and also that the said plea is in other respects uncertain, informal and insufficient etc.

3. *Replication by way of General Traverse.* Such a general traverse in pleadings subsequent to the Plea was not generally allowed at common law. In actions of Trespass, Case, Assumpsit, Debt, Covenant, and Replevin, it was permitted in general where the defendant's plea admitted the plaintiff's right and set up an excuse or justification for defendant's infringement thereof. It was called the *Replication de Injuria*. It was not proper in trespass to a plea of *liberum tenementum*, nor was it proper to a plea of discharge. Consequently no example of such a replication to the pleas above set out is given.

#### EXAMPLE

*Replication de Injuria to Plea of Self-Defense in Trespass to Person.* (Same title.)

And the said Samuel Student as to the plea of the said Peter Policeman by him above pleaded says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said Peter Policeman because he says that the said Peter Policeman at the said times when, etc. of his own wrong and without the cause by him in his said plea alleged,

committed the said trespasses in that plea mentioned and attempted to be justified, in manner and form as the said Samuel Student hath above in his declaration complained against the said Peter Policeman, and this he the said Samuel Student prays may be inquired of by the country.

4. *Replication of Common Traverse or Specific Traverse.*

A written statement by plaintiff denying the truth of one or more of the material allegations of the plea. At common law plaintiff was usually required so to confine his denial as to put in issue only a single material fact.<sup>6</sup>

EXAMPLE

*Traversing plea of liberum tenementum.* (Same title.)

And the said Samuel Student as to the plea of the said Peter Policeman by him above pleaded says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said Peter Policeman because he says that the said dwelling-house in the said declaration mentioned in which, etc., now is not, and at the same several times when, etc., was not the dwelling-house and freehold of the said Peter Policeman in manner and form as the said Peter Policeman hath above in his said plea alleged. And this the said Samuel Student prays may be inquired of by the country, etc.

5. *Replication of Special Traverse.* A written statement denying in an argumentative manner a material allegation of defendant's plea followed by a direct denial, usually introduced by *absque hoc* or *et non*.

EXAMPLE

*Traversing plea of liberum tenementum.* (Same title.)

And the said Samuel Student as to the plea of the said Peter Policeman by him above pleaded says that by reason

<sup>6</sup> For an example of a case where a traverse of an allegation of three distinct facts constituting a single point of defense was allowed, see *Robinson v. Raley*, 1 Burr. 316 (1757).

of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said Peter Policeman because he says that the said dwelling-house in the said declaration mentioned, in which, etc., now is, and at the said several times when, etc., was the dwelling-house and freehold of the said Samuel Student (*absque hoc* that it now is, and at the said several times when, etc., was, or) and not the dwelling-house and freehold of the said Peter Policeman, in the manner and form as the said Peter Policeman hath in his said plea alleged. And this the said Samuel Student prays may be inquired of by the country, etc.

6. *Replication in Confession and Avoidance.* A written statement admitting, either expressly or by failure to deny, the truth of the facts set up by defendant by way of excuse, justification or discharge, and alleging facts, which, as plaintiff contends, avoid such excuse, justification or discharge.

#### EXAMPLE

*To the plea of liberum tenementum.* (Same title.)

And the said Samuel Student as to the plea of the said Peter Policeman by him above pleaded says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said Peter Policeman because he says that while the said dwelling-house was the dwelling-house and freehold of the said Peter Policeman, and before the said time when, etc., to wit on the ——— day of January, 18— (the date of the demise) the said Peter Policeman demised the said dwelling-house with appurtenances to the said Samuel Student, to have and to hold the same to the said Samuel Student, for and during and unto the full end and term of one year from thence next ensuing, and fully to be complete and ended, and so on from year to year, for so long time as they the said Samuel Student and the said Peter Policeman should respectively please, by virtue of which said demise the said Samuel Student afterwards, and before the said time when, etc., entered into the said dwelling-house and became and

was possessed thereof, and continued so thereof possessed, from thence until the said Peter Policeman afterward, and during the continuance of the said demise, to wit, at the said time when, etc., of his own wrong, broke and entered the said dwelling-house and committed the said several trespasses in the said plea mentioned, in manner and form as the said Samuel Student hath above thereof complained against the said Peter Policeman. And this the said Samuel Student is ready to verify; wherefore he prays judgment and his damages by him, the said Samuel Student, sustained by reason of the committing of the said trespasses, to be adjudged to him.

**A Replication in Confession and Avoidance** is to be met by one of the following:

1. General Demurrer.

EXAMPLE

(Same title.)

And the said Peter Policeman as to the replication of the said Samuel Student by him above pleaded to the plea of the said Peter Policeman says that the said replication and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law for the said Samuel Student to have or maintain his aforesaid action against the said Peter Policeman and that he the said Peter Policeman is not bound by the law of the land to answer the same. And this the said Peter Policeman is ready to verify; wherefore, for want of a sufficient replication in this behalf, the said Peter Policeman prays judgment if the said Samuel Student ought to have or maintain his aforesaid action against him.

2. Special Demurrer. To the foregoing general demurrer, there would be added: "And the said Peter Policeman according to the form of the statute in such case made and provided, states" (etc., setting out the defect in form relied on in manner similar to that of the special demurrer to the declaration).

3. Rejoinder of Common or Specific Traverse. Similar to replication of common or specific traverse.

4. Rejoinder of Special Traverse. Similar to replication of special traverse.

5. Rejoinder in Confession and Avoidance.

#### EXAMPLE

*Rejoinder to Replication of demise.* (Same title.)

And the said Peter Policeman, as to the said replication of the said Samuel Student by him above pleaded to the said plea of the said Peter Policeman says that the said Samuel Student ought not by reason of anything by him, the said Samuel Student, in that replication alleged, to have or maintain his aforesaid action against him, the said Peter Policeman because he says that he the said Peter Policeman after the making of the said demise in the said replication mentioned, and while the said Samuel Student was possessed of the said dwelling-house in which, etc., under and by virtue of the said demise, as tenant thereof to the said Peter Policeman, and half a year before the ——— day of January, 18—, to wit, on the ——— day of July, 18—, gave due notice to and then required the said Samuel Student to quit and deliver up the possession of the demised dwelling-house, with the appurtenances, unto the said Peter Policeman on the said ——— day of January, A.D. 18—, then next following; and by means thereof, afterwards, and before the said time when, etc., to wit, on the day and year last aforesaid, the said tenancy, and the estate and interest of the said Samuel Student in the said demised dwelling-house, and the said place in which, etc., with the appurtenances, wholly ended and determined; and thereupon the said Peter Policeman, after the said tenancy was so ended and determined as aforesaid, to wit, at the said several times when, etc., entered into the said dwelling-house in which, etc., and committed the said alleged trespass in the said plea mentioned, as he lawfully might for the cause aforesaid. And this the said Peter Policeman is ready to verify; wherefore he prays judgment if the said Samuel

Student ought to have or maintain his aforesaid action against him, the said Peter Policeman.

**A Rejoinder of Confession and Avoidance** is to be met by one of the following:

1. General Demurrer. Similar to General Demurrer to Plea.
2. Special Demurrer. Similar to Special Demurrer to Plea.
3. Surrejoinder of Common or Specific Traverse.
4. Surrejoinder of Special Traverse.
5. Surrejoinder in Confession and Avoidance.

EXAMPLE

*Surrejoinder of Waiver of Notice to Rejoinder of Notice to Quit.* (Same title.)

And the said Samuel Student, as to the said rejoinder of the said Peter Policeman by him above pleaded to the said replication of the said Samuel Student to the said plea of the said Peter Policeman says that he, the said Samuel Student, by reason of anything by the said Peter Policeman in that rejoinder above alleged, ought not to be barred from having or maintaining his aforesaid action against the said Peter Policeman, because he says that after the giving of the said notice in the said rejoinder mentioned, and before the expiration of the said tenancy, to wit on the 15th day of September, 18—, the said Peter Policeman waived, relinquished and abandoned the said notice, and then assented and agreed with the said Samuel Student to the continuance of the said tenancy in the said replication mentioned, and the said tenancy did continue from thenceforth until and at and after the said time when, etc. And this the said Samuel Student is ready to verify; wherefore, etc. (as in the replication).

**A Surrejoinder in Confession and Avoidance** is to be met by one of the following:

1. General Demurrer. Similar to General Demurrer to Replication.



2. Special Demurrer. Similar to Special Demurrer to Replication.
3. Rebutter of Common or Specific Traverse.
4. Rebutter of Special Traverse.
5. Rebutter in Confession and Avoidance.

#### EXAMPLE

*Rebutter of fraud in obtaining the waiver.* (Same title.)

And the said Peter Policeman, as to the said surrejoinder of the said Samuel Student by him above pleaded to the said rejoinder of the said Peter Policeman to the said replication of the said Samuel Student to the said plea of the said Peter Policeman, says that the said Samuel Student ought not, by reason of anything by the said Samuel Student in that surrejoinder alleged, to have or maintain his aforesaid action against him the said Peter Policeman in respect of the supposed trespasses in the said plea mentioned, because he says that the said Samuel Student caused and procured the said Peter Policeman to waive, relinquish and abandon the said notice in said rejoinder mentioned and to assent and agree with the said Samuel Student to the continuance of said tenancy in said replication mentioned through and by means of the fraud, covin and misrepresentations of the said Samuel Student. And the said Peter Policeman further says that he, the said Peter Policeman, within a reasonable time next after said fraud, covin and misrepresentation came to his knowledge, to wit, on the 20th day of September, 18—, rescinded and abandoned his said waiver, relinquishment, assent and agreement, and so notified the said Samuel Student on said 20th day of September, 18—. And this the said Peter Policeman is ready to verify; wherefore, etc. (as in rejoinder).

**A Rebutter in Confession and Avoidance** is to be met by one of the following:

1. General Demurrer. Similar to General Demurrer to Rejoinder.

2. Special Demurrer. Similar to Special Demurrer to Rejoinder.

3. Surrebutter of Common or Specific Traverse.

4. Surrebutter of Special Traverse.

It is conceivable that the rebutter alleging fraud in the procurement of the waiver of notice to quit might be met by a surrebutter of affirmance of the original waiver or of waiver of the fraud after discovery of the fraud. If so it would be met by a nameless pleading. In order to close the pleadings in the trespass case of which the previous pleadings have been given, there follow a surrebutter of common traverse, and a similiter.

#### EXAMPLE

*Surrebutter.* (Same title.)

And the said Samuel Student, as to the said rebutter of the said Peter Policeman by him above pleaded to the said surrejoinder of the said Samuel Student to the said rejoinder of the said Peter Policeman to the said replication of the said Samuel Student to the said plea of the said Peter Policeman, says that he, the said Samuel Student, by reason of anything by the said Peter Policeman in that rebutter above alleged, ought not to be barred from having his afore-said action against the said Peter Policeman because he says that he the said Samuel Student did not cause or procure the said Peter Policeman to waive, relinquish or abandon the said notice in the said rejoinder mentioned or to assent or agree to the continuance of said tenancy in the said replication mentioned through or by means of the fraud, covin or misrepresentations of the said Samuel Student, in manner and form as in said rebutter is alleged. And of this the said Samuel Student puts himself upon the country, etc.

#### EXAMPLE

*Similiter.* (Same title.)

And the said Peter Policeman as to the said surrebutter of the said Samuel Student, and whereof he hath put himself upon the country, doth the like.

## II. UNDER THE HILARY RULES OF 1834

Pursuant to enactments of Parliament the English judges at the Hilary Term of 1834 promulgated rules governing pleading.<sup>7</sup> The ostensible object was to simplify the common law system; but the interpretation of the rules by the judges made pleading more technical than before. As Professor C. B. Whittier said: "Under the common-law system the matter was bad enough with a pleading question decided in every sixth case. But under the Hilary Rules it was worse. Every fourth case decided a question on the pleadings. Pleading ran riot."<sup>8</sup>

1. The most significant effect of the Hilary Rules was the narrowing of the scope of the General Issue. The scope of that plea after the Rules became operative is indicated below.

*Replevin.* Non cepit, as at common law.

*Detinue.* Non detinet denied only the detention; it did not put plaintiff's interest in issue.

*Debt.* Nil debet was abolished. A plea of never indebted was permitted in simple contract debts except in actions on bills of exchange and promissory notes. This plea permitted any defense which showed that the debt never arose, but all other matters of defense had to be pleaded specially. There was no general issue in actions on bills of exchange and promissory notes; every defense had to be pleaded specially.

*Debt on a bond.* *Non est factum* denied only the fact of execution of the deed.

*Debt on a record.* As at common law.

*Debt on a statute.* Nil debet was abolished. Never indebted was permitted as in debt on a simple contract.

*Covenant.* *Non est factum* denied the execution of the deed sued on in point of fact only.

*Trespass.* In trespass to personal property or to real property. Not guilty denied only the commission by defendant of the trespass alleged.

In trespass to the person. Not guilty had the same scope as at common law.

<sup>7</sup> See Bosanquet, *The New Rules of Pleading* (London, 1835) for the text of the rules and comments thereon.

<sup>8</sup> Whittier, *Notice Pleading*, 31 *Harv. L. Rev.* 501, 507 (1918).

*Case.* Not guilty was a denial "only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defense than such denial shall be admissible under that plea."<sup>9</sup> All other denials had to be specific and all defenses in confession and avoidance had to be pleaded specially.

*Assumpsit.* Non assumpsit in all actions except those on bills of exchange or promissory notes denied the fact of the express promise alleged or the matters of fact from which the alleged promise might be implied by law. There was no general issue in assumpsit on bills of exchange or promissory notes.

*Trover.* The rules did not mention this action, but it may be inferred that not guilty in trover had only the same effect as not guilty in trespass to personal property.

*Ejectment.* As at common law after the invention of the consent rule.

2. The chief other effect of the Rules on pleading was to prohibit the stating of the same single claim in different counts in a declaration or the same single defense in several pleas. The fifth general rule provided:

"Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or recognisances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

"Therefore counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. . . .

"Pleas, avowries, and cognisances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed."<sup>10</sup>

<sup>9</sup> Stephen, Pleading (7 Am. ed., 1854) Appendix lv-lx. A note numbered 44 on the effect of the Hilary Rules on the General Issue and the portion of the Report of the Common Law Commissioners on which the Rules were based are found on pages lv-lxvi. The same note, numbered 37 is found in Williston's ed. (1895) pp. 442-451.

<sup>10</sup> Williston's ed. (1895) *supra*, p. 458 et seq.

3. Unnecessary verbiage in pleas and subsequent pleadings and in demurrers was eliminated. The defendant no longer had to say that he came and defended the wrong and injury or that plaintiff ought not to have or maintain his action, etc., but could state his defense without all such introductory matter. In replications and subsequent pleadings, the plaintiff no longer needed to pray judgment. The demurrer was reduced to a simple statement that the pleading to which it was interposed was insufficient in law and the joinder in demurrer to the assertion that the pleading was sufficient in law. Other changes in the form of pleading were prescribed which tended to make them less complicated in statement.

### III. UNDER A TYPICAL CODE

New York in 1848 enacted the Field Code which made radical changes in procedure, including pleading. This code was used as a model or basis for legislation in many other jurisdictions. In some states practice acts were enacted which simplified pleading but continued the common-law notion that the chief function of pleadings was to develop an issue for trial in such a way that the parties and the court would learn from the pleadings exactly what was to be tried; consequently they provided for a continuation of the pleadings until an issue was reached. The broadening of the scope of the general issue, and the allowance of multiple counts at common law and of multiple pleas under the Statute of Anne had tended to destroy this theory; and one of the objects of the Hilary Rules was to restore its effectiveness. The general theory of the codes is that the parties are to disclose the facts upon which they ground their claims in plain, understandable language, rather than to develop precise issues. The typical Code cuts off the pleadings with the reply, and some of the more modern legislation allows no pleading after the answer. Consequently, where the last permitted pleading sets forth matter in confession and avoidance, nothing in the pleadings discloses how that matter is to be met or what issues may be evolved by the evidence. The codes sometimes retain the nomenclature of the common-law system, viz., declaration, plea and replication; but frequently the plaintiff's first pleading is called complaint, or petition, or narration or statement of claim. This is met on the

facts by defendant's answer, plaintiff's response to which on the facts is called his reply.

## EXAMPLES

*New York.*

Supreme Court of New York

County of New York

Samuel Student, Plaintiff

v.

Peter Policeman, Defendant

} Complaint

Comes now the plaintiff in the above-entitled action and for cause of action against the defendant complains and alleges: (For contents, see Chapter IV, p. 60, *supra*. This complaint was good under the New York Code and is good under the present Practice Act and Rules.)

*Connecticut*—(N.B. In Connecticut the complaint is usually incorporated in the writ of summons and has no separate caption. See Chapter IV, p. 61, *supra*. Connecticut is classified as having a practice act rather than a code of civil procedure. There follows an example of an incorporated complaint.)

1. The plaintiff, before and at the time of the grievances hereinafter complained of, was a boarding-house keeper, carrying on business at the house known as No. 73 Chestnut Street, in Bridgeport, then occupied by the plaintiff.

2. On January 1st, 19—, the defendant, with other men acting under his orders, broke into said house, and forcibly thrust the plaintiff therefrom.

3. The defendant then took possession of said house, and has kept the plaintiff out of the possession thereof from thence to the present time.

4. The business of the plaintiff as a boarding-house keeper was destroyed by the acts of the defendant hereinbefore stated.

5. The plaintiff has suffered \$200 damage thereby. The plaintiff claims \$200 damages.<sup>11</sup>

<sup>11</sup> See Connecticut Practice Book (1908) 423; (1922) 454; (1934) 222.

The complaint is met by one of the following :

**A. Demurrer.** The typical code has no equivalent of the common law general demurrer, or of the special demurrer created by the Statute of Elizabeth. Such a code specifies the grounds of demurrer.

The Code of Civil Procedure of California, sec. 430, for instance, designates ten grounds of demurrer. Items numbered 7 to 10, namely, ambiguity, unintelligibility, uncertainty, and failure to disclose in an action on contract whether or not the contract is written or oral, are not usual. Practically all codes name as a ground of demurrer the failure of the complaint to state facts sufficient to constitute a cause of action. Any defect in a pleading not mentioned in the code as a ground of demurrer may be attacked by motion, but not by demurrer.

#### EXAMPLES

*California*—(Title, as in the Complaint, consists of the names of the parties, the name of the court and county, and the name of the pleading.)

The defendant demurs to the complaint of the plaintiff on the ground that it fails to state facts sufficient to constitute a cause of action.

(The California courts usually refer to a demurrer on this ground as a general demurrer. Usually there is no requirement of a specification of the particulars which constitute the failure to state sufficient facts, but occasionally a statute or rule of court contains such a provision. As to other grounds of demurrer, except lack of jurisdiction, a specification of the particulars on which the statutory defect is based must be stated.)

*Connecticut.*

Superior Court  
Fairfield County

January ———, 19—.

Samuel Student	}	Demurrer
v.		
Peter Policeman		

The defendant demurs to the complaint because it does not aver that the plaintiff was in possession of the premises known as No. 73 Chestnut Street in Bridgeport on January 1st, 19—, at the time of the grievances complained of in said complaint.

(N.B. In Connecticut by statute all demurrers must distinctly specify the reasons why the pleading demurred to is insufficient.)

**B. Answer or Defense of General Denial.** A written statement of defendant denying all the allegations of the complaint. In some states a statute or rule prohibits the use of the general denial. There was no such pleading at common law. It is necessary that the student have clearly in mind the distinction between this defense and the general issue at common law. The answer will have the same title as the complaint, except that "Answer" will be substituted for "Complaint." The content otherwise will be as in the following example. In some states it is usual to omit the portions in brackets, and the prayer for relief may differ somewhat from that given.

#### EXAMPLE

(Title.)

(Comes now) the defendant (and for answer to the complaint of the plaintiff) denies each and every allegation in the complaint contained. Wherefore defendant prays that plaintiff take nothing by this action and that defendant have his costs and disbursements herein.

#### C. Answer or Defense of Specific Denial.

##### EXAMPLES

*Connecticut*—Answer to the Connecticut Complaint above.

(Title as in Connecticut Demurrer above, substituting "Answer" for "Demurrer.")

Paragraphs second, third, fourth and fifth are denied.

or

1. Paragraph first is admitted.
2. Paragraph second is denied.



In some states the body of the Answer would be as follows:

Comes now defendant in the above-entitled action and for answer to the complaint of the plaintiff denies each and every allegation contained in paragraph numbered two thereof.

OR

Comes now defendant and for answer to the complaint denies specifically that at the time of the grievances alleged in said complaint plaintiff was in occupation of the house known as No. 73 Chestnut Street in Bridgeport, and denies specifically that this defendant then or at any other time broke into said house or thrust the plaintiff therefrom.

**D. Defense of New Matter or in Confession and Avoidance.** The codes usually provide that an answer shall consist of denials of the allegations of the complaint which defendant desires to controvert, and a statement of any new matter constituting a defense or counterclaim. The new defensive matter is commonly spoken of as being in confession and avoidance. The statement of such a defense, good under a code or practice act, is illustrated by a Connecticut answer.

#### EXAMPLE

*Connecticut*—(Title as in Connecticut Answer of General Denial.)

After committing the said supposed grievances in the complaint mentioned and before this action, on February 15, 19—, the defendant delivered to the plaintiff, and the plaintiff accepted and received from the defendant ten shares of stock of the X Y Corporation in full satisfaction of the damages in the complaint mentioned, and of all the damages by the plaintiff sustained by reason of the acts therein alleged.

A Defense of New Matter is to be met by one of the following:

**A. Demurrer.** Usually the ground of such a demurrer is merely that the answer, or the separate defense, does not state facts sufficient to constitute a defense. In California, Section

444 of the Code adds as grounds of demurrer, ambiguity, unintelligibility, and uncertainty.

**B. Reply. General Denial.** Where such a reply is allowed by the terms of the code, it merely states that defendant denies each and every allegation of the answer, or of that defense in the answer, which is by way of new matter.

**C. Reply. Specific Denial.** Such a reply may designate a paragraph of the answer and state that it denies each and every allegation in that paragraph; or it may single out a specific, necessary allegation of the answer and deny that. If the latter method is used, care must be taken to avoid the fault of pleading a "negative pregnant." Thus, if the defendant had set up the defense of accord and satisfaction as given above, and plaintiff in his reply denied specifically that "on February 15, 19— the defendant delivered to the plaintiff etc.," the denial would ordinarily be condemned as a negative pregnant with the admission that on some other date defendant delivered, etc. Since a release delivered on a date other than February 15th would be as effective as if the delivery had been on February 15th, the court would say that plaintiff was seeking to take issue on an immaterial allegation. The common law doctrine of negative pregnant has been recognized in most code states.

**D. Reply of New Matter.**

**EXAMPLE**

*Connecticut*—Reply of Fraud to Defense of Release.

1. On February 15, 19—, the defendant, then being the owner of ten shares of stock in the X Y Corporation, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that the X Y Corporation was the owner of assets worth \$1,000,000 in excess of all its liabilities, that it was a going concern and was doing an extensive and active business in the manufacture and sale of drugs.

2. Plaintiff relying on said representations, accepted said ten shares of stock in full satisfaction of the damages in the complaint mentioned.

3. Said representations were false, said X Y Corporation was not the owner of assets worth \$1,000,000 in excess of its liabilities, it was not a going concern, doing an extensive business in the manufacture and sale of drugs; on the contrary said X Y Corporation was totally insolvent and had ceased to do any active business and was in the course of being wound up, and said ten shares of stock were and are worthless.

4. Immediately on discovering said fraud, plaintiff tendered to defendant said ten shares of stock but defendant refused to accept them.

A Reply of New Matter may be met by a demurrer. No further pleading is allowed by most codes. New York and California now terminate the pleadings with the answer, and a growing number of jurisdictions are following their example.

#### COUNTERCLAIMS

There were no counterclaims under the common-law system. Statutes allow the defendant to set up against the plaintiff claims on which he could bring action against plaintiff. The typical Code specifies the kinds of claims to which this privilege applies. There is a tendency in later legislation to allow as counterclaims almost any claims on which the defendant would be able to start action against plaintiff. When defendant interposes a counterclaim, which is in substance a complaint, the plaintiff is privileged to meet it by a demurrer, or by a reply, which is in effect an answer. Ordinarily the Code permits no further pleading.

#### IV. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

In 1934 Congress authorized the Supreme Court of the United States to make rules for the regulation of procedure in the district courts of the United States. The rules promulgated by the Court became effective September 16, 1938. Some amendments took effect March 19, 1948. The rules have met with general approval of the Bench and the Bar. They have been in large measure adopted in a number of states and are serving as a model for procedural reform in many others. They abandon the objective of common-law pleading, namely, the production of a precise issue of fact. They place no emphasis on the chief

purpose of code pleading, namely, the disclosure of all essential facts. They allow much generality of allegation, and protect the parties against surprise at the trial by providing for discovery and pre-trial hearings.

The pleadings are limited in effect to complaint and answer. A reply is required to a counterclaim pleaded as such, and is authorized to any counterclaim. There is no demurrer.<sup>12</sup> The plaintiff's statement of claim is called a complaint. It may be met by an answer on the facts or on the law, or by a motion, which serves the function of a demurrer as an attack on the legal sufficiency of the complaint.

The complaint must contain a short and plain statement of the grounds on which the court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled.

#### EXAMPLE

District Court of the United States  
for the Southern District of  
New York

Civil Action, File Number——

A.B., Plaintiff

v.

C.D., Defendant

1. Plaintiff is a citizen of the State<sup>13</sup> of Connecticut and defendant is a citizen of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. On ——, 19——, in a public highway called —— Street in ——, ——, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

<sup>12</sup> The demurrer has been abolished in England and in New York and some other states. Procedure is there largely regulated by rules of court.

<sup>13</sup> See Official Forms 2 and 9. Since the United States district courts are courts of limited jurisdiction, the complaint must state the grounds on which the court's jurisdiction depends.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

Lewis Lawyer  
Attorney for Plaintiff  
24 Broadway  
New York City.

The Complaint may under Rule 12 be met by:

**A. A motion challenging its sufficiency to state a ground for relief.<sup>14</sup>**

**EXAMPLE**

(Title.)

**Motion to Dismiss**

The defendant moves the court to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Arthur Andrew  
Attorney for Defendant  
50 Wall Street  
New York City.

**B. An answer which may set up defenses in law and fact.<sup>15</sup>**

**EXAMPLE**

(Title)

**Answer**

**First Defense**

The complaint fails to state a claim against defendant upon which relief can be granted.

**Second Defense**

Defendant admits the allegations of paragraph 1 of the complaint, and denies each and every other allegation contained in the complaint.

<sup>14</sup> See Official Form 19. Rule 12 includes other grounds of attack.

<sup>15</sup> See Official Form 20.

## Third Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of the action.

Arthur Andrew  
Attorney for Defendant  
50 Wall Street  
New York City.

## COUNTERCLAIMS

Rule 13 (a) requires a defendant to assert as a counterclaim any claim which was not the subject of an action pending at the commencement of the action in which it is to be asserted and which at the time of filing his answer the defendant had against the plaintiff if it arose out of the transaction or occurrence which is the subject matter of plaintiff's claim. It goes so far as to require it even though the counterclaim cannot be adjudicated without bringing in new parties, provided that the court can acquire jurisdiction of them. Rule 13 (b) permits defendant to interpose as a counterclaim any claim against the plaintiff not arising out of the transaction or occurrence that is the subject matter of plaintiff's claim. The counterclaim may be met by a motion challenging its legal sufficiency or by a reply setting forth a defense in law or in fact.

## V. IN EQUITY

**Generally.** In the beginnings of equity in England, the pleadings were exceedingly simple and informal. There was no attempt to reduce the controversy to a single issue by statement and counter-statement. What the Chancellor wanted was a full disclosure of the material facts. By a process of gradual degeneration, however, the pleadings became highly complex, artificial and technical. Mr. Justice Story's comment upon the bill in equity, as good pleading required it to be in his day, might fairly be applied to the whole system of equity pleading:

“The ability to understand what is the appropriate remedy and relief for the case; to shape the bill fully, accurately, and neatly, without deforming it by loose and immaterial allegations, or loading it with superfluous details;

and to decide who are the proper and necessary parties to the suit;—the ability to do all this requires various talents, vast learning, and a clearness and acuteness of perception, which belongs only to very gifted minds.”<sup>16</sup>

Consequently, it would serve no useful purpose to attempt to carry a neophyte through the subtle mazes of a series of technical documents which would make the intricacies of common-law pleading seem simple. A bare outline must suffice. The suit was instituted by filing a petition, called a bill, setting forth the petitioner's grievances and praying the chancellor to compel defendant to respond thereto, and to award petitioner the proper relief. Originally defendant, when ordered by subpoena to respond, could attack the sufficiency of the bill, or set up facts in opposition or avoidance; and the course of pleading was much the same as at common law. Later, however, plaintiff's pleadings were the bill and replication; defendant's were demurrer, disclaimer, plea or answer.

**Bill in Equity.** The classic bill consisted of nine parts. (1) Direction or address to the court. (2) Introduction, giving the name of the plaintiff and description of the capacity in which he appeared. (3) Premises or stating part, in which plaintiff narrated the facts and circumstance of his case, setting forth every material fact as to which he proposed to offer evidence. (4) Confederating part, in which plaintiff charged defendant with conspiring with others to injure and defraud the plaintiff. (5) Charging part, in which plaintiff set up that defendant was or might be relying upon specified pretended defenses, and alleged facts to destroy them. (These allegations were usually inserted as a basis for discovery of the nature of defendant's case, and often served the purpose which the replication and surrejoinder would have served under the earlier system.) (6) Jurisdiction clause, in which plaintiff alleged defendant's acts to be contrary to equity, and asserted that he had no adequate remedy at law. (7) Interrogatory part, in which plaintiff prayed that defendant be required to answer questions as to specific matters each of which was set out in detail and had to be based upon some allegation previously made

<sup>16</sup> Story, *Equity Pleading* (10 ed.) §13.

in the bill. (8) Prayer for relief, in which plaintiff asked for the specific relief which he desired and also for such relief as the court should deem meet. (9) Prayer for process, in which plaintiff prayed that defendant be compelled to appear and answer and to abide the decree of the court.

**Demurrer, General.** Defendant might challenge the sufficiency of the whole bill by a general demurrer. In this he protested that the allegations of the bill were in no wise true, but averred that, even if they were true, they could not serve as the basis for any decree by the court, and prayed judgment whether he ought to answer further.

**Demurrer, Special.** This was interposed to the whole bill for defect in the form or frame of the bill.

**Demurrer, Partial.** The defendant might for any substantial cause demur to any part of a bill, the allegations of which were separable from the rest and, standing alone, constituted the basis of some portion of the relief sought by plaintiff. In such case he responded to the other parts of the bill by plea or answer.

**Disclaimer.** Defendant might file a disclaimer where plaintiff's bill charged him only with claiming some interest in a specified subject matter and alleged no liability on part of defendant because of the claim or otherwise. In such case the disclaimer would ordinarily entitle defendant to a dismissal.

**Plea.** The defendant might interpose a plea to the whole bill or to any separable part thereof. He often wished to do so in order to avoid the necessity of disclosing the detailed matter which the answer required. The plea set up facts by way of confession and avoidance, which excused defendant from making the answer prayed for by the bill. It was the appropriate pleading for matter in abatement as distinguished from matter in bar. Matter in discharge, such as statute of limitations, release, or former recovery, was also apt subject for a plea. In the later practice a so-called anomalous plea was allowed which consisted of a denial of specified allegations of the bill



where the denial would constitute a single defense. It was said that matter which went to a single essential element of the bill or of some separable portion of it might be properly pleaded in a plea. An example of a plea to a separable portion is a plea to the prayer for discovery, that the discovery would tend to incriminate the defendant.

**Answer.** By answer the defendant made the response called for in the bill, if the answer was to the whole bill. It was of course possible to demur to a part, interpose a plea to another part, and answer to the balance. The answer stated defendant's defense and made responses to the interrogatories contained in the bill. The defendant had to answer the allegations of the bill in detail, "line by line," as was commonly said.

**Replication.** In the classic period this pleading consisted of a formal reassertion of the truth of plaintiff's bill and a denial of the truth of defendant's answer. In the earlier practice, special replications were allowed but the orthodox method of meeting new matter in the answer came to be by an amendment to the bill setting out in effect an anticipatory reply to the new matter.

**Comparison of Pleading in Equity and at Common Law.** The marked differences between the pleadings in equity and those at common law are as follows:

(1) As to the bill. The stating part sets forth the facts constituting P's cause of action.

The charging part has no equivalent in the common-law declaration. It served two purposes: (a) P set forth herein in general language the substance of the evidence to support the allegations in the stating part, as a basis for requiring answers to questions to be put in the interrogating part, (which likewise had no equivalent in common-law pleading); (b) P set forth herein, if he so desired, an anticipatory replication (i) by alleging that D pretended that certain facts existed (the anticipated defense) and, while protesting the falsity of the pretense, that other facts existed (the anticipatory reply), and (ii) by stating the substance of the evidence to support this reply as a basis for interrogatories.

If D in his answer set forth a defense that P had not anticipated, and that he desired to meet otherwise than by denial, D's proper later day procedure was not to make a special reply but to amend his bill by inserting what he might have used as an anticipatory replication.

(2) In equity a demurrer could be interposed only to the bill.

(3) Disclaimer. If D claimed no interest in the subject matter of the suit, he might disclaim and seek dismissal with costs. There was no such pleading at common law.

(4) As to Pleas. At common law all matter of defense was set up in one or more pleas, except for avowry and cognizance in replevin.

In equity the plea was used to avoid the necessity of answering.

(5) Answer. The answer had to meet the bill line by line and respond to all the interrogatories of the bill. It was under oath and served as evidence both for and against defendant. A sworn part of the answer could be overcome only by the testimony of two witnesses or the equivalent thereof.

**Federal Rules.** Under the federal equity rules of 1912 equity pleadings were greatly simplified. The bill was required to be a short and plain statement of the facts without the evidence. Demurrers were abolished and objections to the sufficiency of the bill were pleaded in the answer. There were no pleas. The matter formerly proper for them was inserted in the answer or put forward on motion. And the answer had to set out in plain and concise terms the defendant's defense to each claim asserted in the bill. In effect the rules of 1912 made the pleadings in equity as to content analogous to those under a typical code.

Under the Federal Rules of Civil Procedure there is no separate equity pleading. Whether the action is one which before the adoption of these rules would have been in equity or in law is immaterial; the form and requisites of the pleadings are the same.

As the Federal Equity Rules of 1912 greatly simplified equity pleadings, so most jurisdictions where the distinction between actions at law and suits in equity still exists have done likewise.

**Under the Codes.** Under most modern codes of procedure there is no separate equity pleading. The plaintiff states his

case in his complaint as in an action at law, and the subsequent pleadings are as in a law action. The traditions of equity pleading, however, tend to persist and to make the usual complaint for equitable relief more prolix and detailed than the complaint for legal relief.

## CHAPTER VII

### HOW TO READ AND ABSTRACT A REPORTED CASE

**The Report.** The report of a case may be merely a memorandum of a portion of the proceedings before a trial judge, for example, its rulings upon evidence, or a decision upon a demurrer or upon a motion for a nonsuit or a directed verdict; it may be a record of a hearing before a trial judge or the court en banc upon a motion in arrest of judgment, or for a new trial, or for judgment notwithstanding the verdict, or to take off a nonsuit and enter judgment upon a verdict taken by consent; or it may be an account of proceedings before an appellate court. ✓ If it is an adequate report, it will usually contain (1) the title of the case, (2) headnote or syllabus, (3) statement of the case, (4) abstract or arguments of counsel, (5) opinion or opinions of the court, and (6) a statement of the disposition made of the case.

**Title.** The title of a case in an adversary proceeding in the trial court is usually made up of the names of the parties litigant with the designation of the character in which they respectively appear, as, Samuel Student, Plaintiff, v. Peter Policeman, Defendant; or Samuel Student, Plaintiff, v. Peter Policeman, Defendant; Oliver Officer, Intervenor. In non-adversary proceedings and even in some adversary proceedings the title contains the name of but one party, as In re Peter Policeman, Bankrupt, or Ex parte Samuel Student. In the latter class of case, the title remains the same in the appellate courts; in the former, the practice differs. In some jurisdictions when the defendant appeals or sues out a writ of error, his name appears first, as Peter Policeman, Appellant (or Plaintiff in Error), v. Samuel Student, Appellee (or Respondent or Defendant in Error). Where the parties are designated as plaintiff or defendant in error, the case must be read with great care, for at times the court may use plaintiff to mean plaintiff below and at other times to mean plaintiff in error. In order to avoid such possible confusion, the practice has been adopted in some juris-

dictions of retaining the names of the parties in their original order and adding the designation of the characters in which they respectively appear in the trial and appellate courts, as Samuel Student, Plaintiff-Appellee, v. Peter Policeman, Defendant-Appellant; others retain them in the original order and add merely the designation in which they appear in the appellate court, as Samuel Student, Respondent, v. Peter Policeman, Appellant.

**Headnote or Syllabus.** The headnote or syllabus—sometimes made by the reporter, sometimes by the judge who writes the opinion—purports to be a brief abstract of the opinion of the court. Headnotes vary greatly in length, style and accuracy. Some set forth the facts in detail with a brief statement of the decision; some state what is intended to be the abstract proposition of law for which the case stands; and some combine the two forms. But whatever their form and whatever their authorship, headnotes are not, in absence of controlling statute, part of the opinion and are not to be treated as such. They are never to be relied upon until checked up by the opinion. Often they express mere dicta; frequently they are inaccurately phrased, and in some instances they are absolutely wrong.

**Statement of the Case.** The statement of the case, furnished either by the reporter or by the court, usually precedes the opinion, but is sometimes, in whole or in part, embodied in it. For example, in *Tinn v. Hoffman & Co.*, 29 Law T. R. (N.S.) 271, the facts are set forth at length preceding the opinion; in *Stanton v. Dennis*, 64 Wash. 85, and in *Wheat v. Cross*, 31 Md. 99, they are stated by the court at the opening of the opinion; and in *Lewis v. Browning*, 130 Mass. 173, they are given toward the end of the opinion. In some instances it requires a very careful reading of the report to ascertain the facts, and on rare occasions a dissenting judge will insist that the prevailing opinion misstates them. Besides showing the facts upon which the controversy turns, the statement of the case should set out the manner in which the points in dispute were brought to the attention of the trial court, whether, for example, on an objection to the introduction of evidence, on a demurrer, or on a motion. If the report is of a review of the trial court's decision, the

statement should also make clear the proceedings in the trial court so far as pertinent to the questions to be reviewed, the manner in which the case is brought to the reviewing court, and the grounds on which a reversal is sought.

**Argument of Counsel.** An abstract of the arguments of counsel is found in most of the older reports; but it has become customary with modern reporters usually to omit all reference thereto, except in so far as the opinion mentions counsel's contentions for the purpose of adopting or rejecting them. Usually the names of counsel are printed, sometimes preceding the opinion, and sometimes at the end of the case.

**The Opinion.** The opinion is ordinarily written for the court by one member thereof, whose name is indicated. Sometimes it is anonymous, and it is then in America designated a *per curiam* opinion. Occasionally one or more judges disagree with the majority and write dissenting opinions, setting forth the grounds for such disagreement. At times the several members of the court write separate opinions, although each opinion writer agrees in result with one or more of the others.

**Disposition of Case.** The statement of the disposition made of the case is usually very brief, such as "Rule nisi," or "Rule refused," or "Rule discharged," or "Rule absolute," or "Order affirmed," or "Judgment reversed," or "Reversed and remanded." Occasionally a report will end with the phrase, "*cur. adv. vult*," or "*adjournatur*."

An explanation of some of these expressions will be found on pages 161-165, *infra*. The word rule in this connection is used in the sense of order. In more modern language the court disposes of orders or judgments, the validity of which is before them, by affirming or reversing them, frequently sending the cases back, that is remanding them, to the trial court with instructions as to further disposition of the case.

**Casebooks.** In the books of selected cases upon various topics of the law, used in most law schools, the title includes not only the names of the parties, but also the date of the decision and a reference to the book and page of the official report wherein

the case is reported. The headnote is not printed. Frequently the arguments of counsel are condensed or entirely omitted. In some cases only so much of the statement of facts and of the opinion is given as relates to particular points under consideration. Occasionally the editor of a casebook makes such deletions from, or such summaries of portions of, the official text as to justify an interpretation of the decision which the official report would not warrant.

**Dictum or Decision.** In reading and analyzing any opinion of a judge or court, the true function of judicial tribunals in our scheme of government must be constantly borne in mind, namely, the settlement of actual controversies duly presented to them. It is no part of the duty of a court to pass upon moot cases or to answer hypothetical questions. Consequently when a real case is presented, the court performs all of its proper functions in deciding the issues actually submitted to it. Does this mean that it should simply render its decision that A should recover from B, or that the trial court ruled correctly or erroneously without indicating the reasons therefor? As was suggested in the first chapter, the law may be the sum of the rules administered by the courts. These rules are deduced from the cases in which they are applied. In theory the court to which a new problem is presented attempts to decide it as it believes all cases on substantially similar facts should be decided. In other words, it attempts to formulate a general rule or statement of a principle applicable to all cases with the same operative facts and to determine the instant case accordingly. It is thereby laying down a rule by which the legal relations of the parties litigant are determined *ex post facto* and by which the conduct of other parties is expected to be ordered in the future. It is highly desirable that judge-made law should have sufficient uniformity and stability to enable members of the community to know in advance with substantial accuracy the legal effect of a particular line of conduct. Consequently prior decisions in the same jurisdiction should be followed in the absence of weighty reasons to the contrary. It is therefore clear that it is the proper function of the court to indicate in its opinion the rule which it is applying and the reasons why it deems such rule to be applicable. Anything further is unnecessary; and while it may be interesting, enlightening, and altogether sound, it cannot be considered

of equal weight with those pronouncements of the court which are essential to the decision. Those portions of an opinion not necessary to the decision are usually called dicta or obiter dicta. When a court in discussing a case at bar, by way of illustration puts a hypothetical case and renders a decision thereon; or when it goes beyond the facts of the case at hand and enunciates a rule much broader than the issues submitted demand; or when the judge writing the opinion ventures a statement as to what the law is or should be upon a collateral matter, the court or judge, as the case may be, promulgates merely a dictum.

For instance, if a court in passing upon the enforceability of a gratuitous written unsealed promise should lay down the rule that no promise was enforceable unless supported by a consideration, this pronouncement would be inapplicable in a later action upon a promise under seal. In the case of *Dickinson v. Dodds*, 2 Chancery Division 463, there were just two questions that it was necessary for the court to decide. The first was whether a certain memorandum signed by Dodds constituted a contract or a mere offer, and the second was, whether, if it were an offer only, Dickinson's acceptance was made while the offer was still open. Mellish, L. J., however, in the course of his opinion, delivered the following dicta: (1) "It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document." (2) "Assuming Allan to have known that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds." (3) "It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible." Had all the justices agreed with Mellish, the case would not be regarded as of primary authority on these points because these utterances were not necessary for the decision of any issue presented.

On the other hand, those portions of the opinion setting forth the rules of law applied by the court, the application of which was required for the determination of the issues presented, are



to be considered as decision and as primary authority in later cases in the same jurisdiction. For example, the authority of *Dickinson v. Dodds* is not limited to controversies wherein the parties have those identical names, or the memorandum contains precisely the same words, or the offeree goes through exactly the same mental processes and does the same overt acts, and the offerer's conduct and the offeree's notice of it are duplications in detail of those of *Dodds* and *Dickinson*. Indeed, an examination of that case shows it to be primary authority for the following propositions: 1. In construing a writing, all portions of it **must** be taken into consideration. This is nowhere distinctly stated by the court, probably because it is too well settled to call even for statement and was conceded by both sides. As the point was neither argued nor discussed, the decision would not be of great weight but would show the court's understanding and application of the rule. 2. An offerer whose promise to keep the offer open until a specified date is neither under seal nor supported by a consideration is privileged to revoke it, while unaccepted, before that date. 3. The power of an offeree to accept an offer is destroyed when before acceptance knowledge that the offerer has revoked the offer reaches the offeree, even though he receives such knowledge from some source other than the offerer or his agent. Neither the second nor the third proposition can be found verbatim in any of the opinions, but they are clearly at the foundation of the opinions of both James, L. J., and Mellish, L. J., and the substance of them is stated. This case then may be said to be a decision upon three propositions which are nowhere specifically phrased in it, and to contain only dicta as to three propositions which may be quoted in the exact language of Lord Justice Mellish.

**Same—Several Errors Alleged.** There are many cases where a hypercritical examination of the opinion might lead one to say that none of the several propositions enunciated by the court constitutes decision, but all must be classed as dicta. For example, defendant appeals from an order denying a new trial, and assigns four separate and distinct errors. The appellate court determines that the trial court was wrong upon each ground of error assigned. Now it may be said that all the appellate court is called upon to determine is whether the trial

court erred in denying a new trial. If the latter court was wrong in one of the respects specified, its order must be reversed. Consequently, the appellate court's opinion upon one only of these points is decision, and upon all others constitutes dicta; and since it has not placed its decision exclusively upon one ground, the entire opinion must be regarded as dicta. This reasoning is, however, too refined for practical purposes. The appellate court may very properly give the trial court instruction how to proceed on a new trial. While it is true that it need have considered only one of the alleged errors, in order to decide the case, yet each one of them was distinctly presented to it for consideration and was deliberately passed upon.

A somewhat similar situation is presented if, in the above case, the court determines that the trial court did not err in the first three respects assigned, but did err in the fourth. The pronouncement upon the fourth error is clearly decision; but what of that upon the first three? Here, again, these three issues were distinctly presented and deliberately considered, and the court's determination thereof must be treated as decision and not as dicta. Obviously, if the appellate court finds no error in any of the respects assigned, its findings on all four are decision, for they were essential to the determination that the trial court's order be affirmed.

**The Value of Dicta and of Foreign Decisions, etc.** While a previous case is entitled to weight as primary authority only upon the points necessarily decided, it must not be assumed that a judicial dictum is without value. A well-considered dictum by a judge of ability and learning may have a powerful influence upon the development of the law. It may be considered of much greater worth than a square decision from a foreign jurisdiction or even from a sister state. It cannot be safely ignored by student or practitioner. Of course, normally, prior decisions from the same jurisdiction will receive chief attention; cases in point from other jurisdictions, dicta from the same and from other jurisdictions and the opinions of text writers, commentators and legal essayists will be considered of less moment, but all of them may be of importance in aiding the court to reach a satisfactory conclusion in a particular case. Prior decisions of the court of last resort, all the inferior courts of the same juris-

diction will feel bound to follow except in most extraordinary circumstances, and the burden of overthrowing them even in the court which rendered them will be heavy. Prior dicta are given respectful attention, but their influence depends very largely upon the particular circumstances under which they were uttered. Decisions and dicta from other jurisdictions owe their persuasive force in a great degree to their inherent worth, but the courts do not overlook the importance of having harmonious rules upon the same subject in the several states and, indeed, in all the jurisdictions with the same system of law.

The process of determining the value of such judicial pronouncements involves a consideration of the following questions with reference to each judicial decision. ¶ *As to the court*, is it a trial court, an intermediate appellate court or a court of last resort? Is it a court of some obscure jurisdiction where litigation is of an unimportant character and the bench and bar poorly educated; or is the court so overcrowded with work that it habitually or frequently renders opinions without thorough and scholarly investigation, or is it a court of high reputation? Is the judge who rendered the opinion of recognized learning and ability, or is he "famously ignorant"? ¶ *As to the report*, is it official and accurate; is it the only report of the case or are there several reports; if there are several, do they disagree as to the pertinent point; what is the reputation of the reporter for accuracy; is the report full and detailed, or a mere memorandum or note? Was the case thoroughly argued by able counsel on both sides, or was there an appearance for one side only, or was it submitted without adequate argument? ¶ *As to the opinion*, is it, upon the problem in hand, decision or dictum; is it well reasoned and fortified by the authority of prior judicial decisions; does it consider prior pertinent cases within and without the jurisdiction, or does it rely upon generalities from an encyclopaedia, or upon unscholarly text writers; does it fail to notice a point which might have been material; is it by a unanimous or by a divided court; if there is more than one opinion, do they agree in reasoning as well as in result? ¶ *As to its non-judicial setting*, may the decision be attributed to peculiar political, economic or social conditions temporarily existing in the jurisdiction at the time of its rendition, or may it have been influenced by the particularly distressing or appealing or otherwise peculiar facts of the case? ¶ *As to its judicial*

*history*, was it a case of first impression; has it been modified or overruled or doubted or affirmed by later cases; has it been ignored or frequently cited; is it in accord with the trend of modern decisions in the same and other jurisdictions? *As to its present applicability*, have newly discovered truths made the decision inapplicable or impaired the foundation upon which it rests; have changed and changing notions of what sound social policy demands made the result of applying it shocking or undesirable or of doubtful utility?

In evaluating the opinions of editors and commentators, the education, experience, political, economic and social background, and the professional standing of the writer must be weighed. Investigation must be made to determine whether the work shows *scholarly research and intelligent interpretation of the authorities*; whether the views expressed are the result of fair and impartial examination of judicial decisions and other pertinent authorities, or are merely preconceived theories which the authorities have been tortured to support; and whether they accord with what modern decisions show to be the prevailing ideas of the courts as to sound social policy. ✓

**Abstracting a Case.** As preparation for classroom work, the student is in each course required to read an assigned number of cases. He should get those cases so thoroughly in mind as to be able to state them in the same manner in which counsel, in argument of a case at bar, would present his authorities to the court. This he can never do unless (1) he comprehends the meaning of every word and phrase, for often the meaning of an unfamiliar word or expression will give the key to the whole opinion (at the end of this paragraph are found explanations of some common terms; for others the student should consult a law dictionary), and (2) he has read and reread each case until he has a complete understanding of it. As an aid in thus fixing a case in mind, he should make a careful abstract of it. This abstract, like the statement of a case in argument, should contain the following parts, and ordinarily the parts should be arranged in the order indicated:

1. Title, date, and place where reported in the reports.
2. Statements of the facts in the case, including a statement of the manner in which the issue was presented to the trial court. That is, besides the facts relevant to the dispute between the

parties, it should be shown whether the trial court considered the case on demurrer, or on a trial on the merits, or on motion in arrest of judgment or for a new trial, etc.

✓3. Statement of the disposition made of the case by the trial court, including such rulings of the court as are pertinent to the issues presented to the appellate court.

✓4. Statement of the manner in which the case comes before the appellate court, including the grounds of error alleged by appellant.

✓5. Decision of the appellate court.

✓6. Reasons upon which the decision is based, including, where important, the manner in which the court meets the argument advanced by counsel.

The foregoing suggestions assume that the case to be abstracted is not a decision of the court of first instance. Where such is not the fact, the abstract must be modified to meet the particular case; but the essential elements indicated should appear.

A sample abstract of the case of *Dickinson v. Dodds* follows:

*DICKINSON v. DODDS*, 2 Ch. Div. 463, 1876.

June 10 Dodds delivered to Dickinson a memorandum agreeing to sell to Dickinson certain premises for £800, to which he attached a postscript stating "this offer" to be open till June 12, 9 A.M. In the morning of June 11 Dickinson decided to accept, but did not communicate his acceptance to Dodds. The same afternoon Dickinson learned that Dodds had agreed to sell the premises to one Allan. Thereafter and before 9 A.M. June 12, Dickinson gave Dodds his acceptance in writing. Dodds refused to convey. Dickinson brought suit in equity against Dodds and Allan for specific performance of the alleged agreement.

The cause was tried before Vice-Chancellor Bacon, who on the above facts decreed specific performance. The defendants appealed.

On appeal the plaintiff's bill was dismissed. Dickinson was not entitled to recover because

1. The memorandum contained a mere offer, which was revocable at any time before acceptance.

2. The revocation of an offer is effective as soon as the offeree knows that the offer has been revoked, even though the offerer has given him no notice thereof.

## MEANING OF TERMS

*Adjournatur*—It is adjourned, that is, the hearing or consideration of the case is postponed without a decision.

*Appeal*—Aside from statute, this exists in equity but not at common law. An appeal removes the cause from the inferior to the superior court for a review of both questions of law and questions of fact. Originally the superior court re-examined the facts as if the inferior court or officer had not passed upon them. The superior court drew its own conclusions from the evidence. In theory it might even receive additional evidence, but this was not often done in practice. Under modern statutes the word appeal is frequently used to include both the common law writ of error and the equity appeal.

*Bill of Exceptions*—This is of statutory origin, and is the means of saving for review by a superior court all rulings of the trial judge which do not appear in the common-law record. Modern statutes often provide other methods of saving such rulings for review. The bill of exceptions is fully explained in the excerpt from *Defiance Fruit Company v. Fox*, 76 N. J. L. 482, 488-9 (1908): "By the ancient common law a writ of error lay only for an error in law apparent in the record or for an error in fact, such as the death of a party before judgment. It lay not for an error in law not appearing in the record. But more than six hundred years ago this was remedied by the Stat. Westm. 2; 13 Edw. I., ch. 31 (1 Stat. at L. 99; 1 Bac. Abr. 527; 2 Inst. 426), whereby it was enacted that 'When one that is impleaded before any of the justices doth allege an exception, praying that the justices will allow it, which, if they will not allow, if he that alleged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and if one will not, another of the company shall. And if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be found not in the roll, and the plaintiff shew the exception written, with the seal of a justice put to, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal.

And if the justice cannot deny his seal, they shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed.'

"There is nothing in this language, nor in the purpose of the enactment, to confine the bill of exceptions to questions of law raised upon the trial of an action.

"As pointed out by Lord Coke (2 Inst. 427): 'This extendeth not only to all pleas dilatory and peremptory, & c., and (as hath been said) to prayers to be received, oyer of any record or deed, and the like; but also to all challenges of any jurors and any material evidence given to any jury which by the court is overruled.' "

*Cause of Action*—The phrase "cause of action" was used by the common-law courts, but apparently without any attempt at precise definition. In the modern litigation and legal writing, the attempts to define it and the occasions for its application are various, for it has been used in sundry connections in the code: (1) The complaint must state the facts constituting P's cause of action. (2) A party may join in one complaint "two or more causes of action arising out of the same transaction" etc. (3) A defendant in an action on contract may in his answer interpose as a counterclaim any other cause of action on contract. (4) An amendment may not be made after the statute of limitations has run if it introduces a new cause of action. (5) A prior judgment bars an action for the same cause of action. Pomeroy defines a cause of action as the facts which constitute one primary right plus one delict or wrong which infringes that right. Bliss says: "The cause of action, then, is the wrong," explaining that he means the facts constituting the wrong, and that a wrong is an infraction of a right. Judge Clark considers a cause of action as an aggregate of operative facts giving rise to a right or rights termed "right" or "rights of action" which will be enforced by the courts. The number and extent of operative facts included within a single cause of action are to be determined pragmatically mainly by considerations of practical trial convenience. Professor McCaskill defines it as that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving

cause for the state through its courts to afford relief to the party or parties whose right was invaded. Dean Gavit insists that the facts are not the cause of action but that they in conjunction with the appropriate rule of law make up the cause of action, which is a "specific substantive right as a matter of the substantive law." (By this Dean Gavit means apparently the right which P has because of what Pomeroy would call P's primary right plus what Pomeroy would call D's violation thereof. This is the usual case. The cases wherein P has the right to have a will construed, or to have property partitioned etc. need not be explained here.) The following contain a full discussion: Clark, Code Pleading (2 ed.) 78-90, 472-479; 33 Yale L. J. 817; 34 id. 879; 82 U. of Pa. L. Rev. 354; McCaskill, 34 Yale L. J. 614; Arnold, 19 A. B. A. Journal 215; Gavit, 30 Columbia L. Rev. 802; 82 U. of Pa. L. Rev. 129, 695.

It will be noted that Prof. McCaskill does not depart widely in definition from Pomeroy or Bliss, but, unlike them, he insists that a right is necessarily tied up with the remedy for its infringement. Thus for a breach of contract to convey realty, he would say that P had two causes of action, one for damages, the other for specific performance. Apparently if D's wrong is single and P's right is single and P is confined to a single recovery, there is but one cause of action; but he seems inclined to require separate statements as of separate causes of action where P attempts to rely on more than one theory.

*Certiorari*—A writ in the nature of a writ of error issued by a superior court requiring an inferior court or a nonjudicial tribunal whose procedure is not according to the course of the common law to send to the superior court the records and proceedings in a cause which is pending or has been terminated in the inferior court or tribunal. It lies only to correct errors of law, is not a matter of right and will not be granted unless the party seeking the writ satisfies the superior court that substantial justice requires it. See *Farmington River Water Power Co. v. County Commissioners*, 112 Mass. 206 (1873).

*Common Law*—As distinguished from legislation, ordinarily denotes the body of principles, standards and rules applied



by courts in controversies brought before them which are not governed by legislative enactments.

As distinguished from equity, it denotes the body of principles, standards, and rules applied by common-law courts as contrasted with those applied by courts of equity. When the regular royal courts had developed a rigid procedure and had been confined to limited forms of relief in specified classes of controversies, persons who were unable to secure redress through the usual procedure petitioned the King for aid in obtaining justice. In the reign of Edward III all such matters of grace were by ordinance referred to the Chancellor. In the process of disposing of them there evolved a court with the Chancellor at its head, which administered "rules of equity and good conscience." These were originally rather indefinite and elastic but later developed a large degree of definiteness and rigidity. This court and its successors and its counterparts in this country are called courts of equity; and the principles, standards, and rules applied by them are those of equity as distinguished from common law.

*Curia Advisari Vult*, abbreviated to *cur. adv. vult*—The court desires to be advised, i. e., will take the case under advisement and make a decision later.

*Demurrer*—See Chapter VI, p. 118.

*Forms of Action*—See Chapter V.

*Joinder in Demurrer*—See Chapter VI, p. 119.

*Joinder of Issue*—See Chapter VI, p. 123.

*Judgment as Distinguished from Verdict*—See Chapter IV, p. 72.

*Nonsuit*—At early common law if the plaintiff did not appear when the jury returned to deliver its verdict, the verdict could not be received, and plaintiff was nonsuited, that is, the action was at an end and defendant recovered his costs. Later the term was used to describe plaintiff's failure or refusal to go on with the action in such way as to amount to an abandonment of the case. There was no compulsory nonsuit at common law. By statute or rule of court a compulsory nonsuit is now allowed in many jurisdictions. See Chapter IV—Motions During Trial, p. 68.

*Pleadings*—*Names of*—Declaration, Complaint, Narration, Petition or Statement of Claim; Plea, Avowry, Cognizance,

Answer or Defense; Replication or Reply; Rejoinder; Surrejoinder; Rebutter; Surrebutter. See Chapter VI.

*Rule Nisi*—An order of a court that a party show cause why specified action should not be taken, e. g., why a new trial should not be granted. It presents the same sort of question as a motion by an opponent that the action should be taken, e. g., an order to show cause why a return of service of summons should not be quashed presents the same question as a motion to quash the return.

*Rule Absolute*—An order in effect that the action specified in the rule nisi be taken, e. g., that the return of service of summons be quashed.

*Rule Discharged*—An order in effect that the action specified in the rule nisi be not taken, e. g., that a new trial be denied.

*Verdict as Distinguished from Judgment*—See Chapter IV, p. 72.

*Writ of Error*—A writ issued by a superior court to an inferior court commanding the latter to send to the former the record and proceedings in a specified case in which the inferior court has rendered judgment in order that the superior court may do what ought to be done for correcting alleged errors. This was the process for review at common law, as distinguished from equity. The only errors subject to correction were errors of law appearing in the common-law record or in a bill of exceptions. Errors in deciding questions of fact under a proper rule of law were not reviewable by a superior court at common law.

The common-law record consisted of the writ of summons, the sheriff's return thereon, the pleadings including a demurrer if any, and the judgment. It did not include the evidence.

## CHAPTER VIII

### REPOSITORIES OF THE LAW

The common-law lawyer, when preparing an argument with which to convince a court or other tribunal, a prediction of how the courts or administrative agencies will react to a given course of conduct as the basis of advice to a client, or a scholarly treatment of some phase of the law either for teaching purposes or for publication, and the judge or administrative officer, when seeking the grounds for a decision, are continually forced to search for authorities upon which to base their conclusions. These authorities are found in law books. A knowledge of law books and their use is, therefore, of the highest importance to anyone who intends to work in the field of law.

For purposes of convenience of treatment, law books are classified as follows: (1) primary authorities, or books containing the law; (2) secondary authorities, or books about the law; and (3) key books, or books useful in searching for the law. Primary authorities include the following classes: (1) constitutions, charters, and organic laws; (2) session laws, compilations, codes, and ordinances; (3) proclamations, orders, and decrees; (4) administrative rules and regulations; (5) rules of court; and (6) administrative rules of procedure and practice. These classes are popularly called the "written law." Primary authorities also include the following classes of the so-called "unwritten law": (1) judicial decisions, and (2) administrative orders, rulings, and findings. Secondary authorities consist of commentaries on and restatements and interpretations of primary authorities. And key books comprise indexes, tables, etc. It is not as easy, however, to classify books as it is to classify the material contained in them. Any classification of them must be arbitrary, because any single book is likely to contain material of all three classes. Therefore, an attempt has been made in this chapter to list under the three main categories not only books but also parts of books.

The list is not intended to be an exhaustive bibliography but rather a convenient guide to those materials in Federal, state,

and municipal law which may prove useful to the law student and to the practicing lawyer. Because American law is so closely related to British law, books from the latter have also been included in separate sections of the list.

## I. BOOKS OF PRIMARY AUTHORITY

### A. LEGISLATION IN THE UNITED STATES

#### 1. Constitutions.

##### a. Federal.

*Statutes at Large*, Volume 1 (cited: Const., Art. I, Sec. 1, 1 Stat. 10). Constitution and first 12 amendments.

13th Amendment—13 Stat. 774 (1865).

14th Amendment—15 Stat. 708 (1868).

15th Amendment—16 Stat. 1131 (1870).

16th Amendment—37 Stat. 1785 (1913).

17th Amendment—38 Stat. 2049 (1913).

18th Amendment—40 Stat. 1941 (1919).

19th Amendment—41 Stat. 1823 (1920).

20th Amendment—47 Stat. 2569 (1933).

21st Amendment—48 Stat. 1749 (1933).

*Revised Statutes (2d ed., 1878)* (cited: Rev. Stat. 1878, p. 17). Constitution and first 15 amendments.

*United States Code, 1946 ed.* (cited: 1 U. S. C., 1946 ed., p. XXXIII). Constitution and first 21 amendments.

*The Constitution of the United States, Amended to January 1, 1938, Annotated.* (Published as S. Doc. 282, 74th Cong., 2d sess., 1938.) Constitution and first 21 amendments.

*House Manual (Constitution, Jefferson's Manual and Rules of the House of Representatives)*, published biennially.

*Senate Manual Containing the Standing Rules and Orders of the United States Senate, the Constitution of the United States, Declaration of Independence, Articles of Confederation, the Ordinances of 1787, Jefferson's Manual, etc.*, published biennially.

*United States Code Annotated* (cited: U. S. C. A., Const., Art. I, Sec. 1).

*Federal Code Annotated* (cited: F. C. A., Const., Art. I, Sec. 1).

For convenient reference, the Federal Constitution is published in the compilation of statutes of most states, in many state legislative manuals, and in most constitutional law treatises. Copies are often distributed

by the office of the Secretary of State. An annotated edition should be used when possible.

*Amendments to the Constitution.*

Where Found.

The volumes containing the Amendments to the Constitution have already been listed in paragraph 1, *supra*.

Legislative History.

An amendment proposed in Congress goes through the usual legislative stages and its legislative history in Congress may be traced in the same manner as other legislation. When an amendment receives the necessary two-thirds vote of each house, it becomes a joint resolution and as such is deposited with the Secretary of State and printed in the Statutes at Large. Amendments must, of course, be ratified by three-fourths of the States, either by convention or legislature; therefore, the second phase of its legislative history must be traced in the proceedings of the State legislature or convention. When the requisite number of States have ratified an amendment, the Secretary of State so certifies and announces in the Department's Press Releases. The Secretary's certificate is also printed in the Statutes at Large.

Two compilations have been made of amendments which have been proposed:

*The Proposed Amendments to the Constitution of the United States During the First Century of its History* (1897), prepared by Herman V. Ames. This work has been published as H. Doc. 353, pt. 2, 54th Cong., 2d sess. (1897). It sets forth historical facts concerning all amendments proposed to the Constitution from 1789 to the date of publication. The material is arranged according to subject matter and there is a calendar of amendments proposed and an index.

*Proposed Amendments to the Constitution* (1929), H. Doc. 551, 70th Cong., 2d sess., compiled by M. A. Musmanno. It includes all amendments proposed in Congress from 1889 to 1929. This material is also arranged according to subject matter. There is no index.

b. State.

The constitution of each state is generally published in the compilation of the statutes of that state.

Separate copies of the state constitution, sometimes in an annotated form, may be obtained from the office of the Secretary of State or of the State Librarian.

## c. Federal and State.

*The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, edited by Ben Perley Poore. 2 vols. 2 ed. Washington, Govt. Print. Off., 1878.

*The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, edited by Francis Newton Thorpe. 7 vols. Washington, Govt. Print. Off., 1907 (H. Doc. 357, 59th Cong., 2d sess.)

*The State Constitutions and the Federal Constitution and Organic Laws of the Territories and Other Colonial Dependencies of the United States of America*, compiled and edited by Charles Kettleborough. Indianapolis, B. F. Bowen and Co., 1918.

*Constitutions of the States and United States*. (Albany), New York State Constitutional Convention Committee, 1938. (Vol. 3 of *Reports of the Constitutional Convention Committee*.)

## d. Documents Antecedent to the Federal Constitution.

*The Declaration of Independence*, the *Ordinance of 1787*, and the *Articles of Confederation* can be found in sections 1a and 1b above. In some instances, these documents may also be found in compilations of state laws, e. g., Smith-Hurd's *Illinois Annotated Statutes*.

## e. Indian Charters and Constitutions.

The constitutions of the Five Civilized Tribes, etc.

Cherokee Nation: *Constitution of the Cherokee Nation, formed by a Convention of Delegates from the Several Districts, at New Echota, July 1827*.

Chickasaw Nation: *Constitution and Laws of the Chickasaw Nation, Constitution Adopted at Tishomingo City, in 1856*. Tishomingo City, 1857.

Choctaw Nation: *The Constitution and Laws of the Choctaw Nation*, Park Hill, Cherokee Nation, 1840.

Creek (or Muskogee) Nation: *Constitution and Civil and Criminal Code of the Muskogee Nation, approved at the Council Ground. Muskogee Nation, October 12, 1867*. Washington, D. C., 1868.

Osage Nation: *The Constitution and Laws of the Osage Nation, passed at Pawhuska, Osage Nation, in the years 1881 and 1882*. Washington, D. C. 1883.

Sac and Fox Nation: *Constitution and Laws of the Sac and Fox Nation, Indian Territory*. St. Louis and New York, 1888.

Seneca Nation: *Constitution of the Seneca Nation of Indians*. Baltimore, 1848.

Under the Indian Reorganization Act, June 18, 1934, c. 576, 48 Stat. 984 (25 U. S. C. Sec. 461 ff.), the Oklahoma Welfare Act, June 26, 1936, c. 831, 49 Stat. 1967 (25 U. S. C. Secs. 501-509), and the Alaska Organization Act, May 1, 1936, c. 254, Sec. 1, 49 Stat. 1250 (25

U. S. C. Sec. 473a), many Indian tribes under the jurisdiction of the United States have adopted charters and constitutions and by-laws subject to the approval of the Secretary of the Interior. A large number of these have already been printed by the Government Printing Office under the auspices of the Office of Indian Affairs.

## 2. Treaties.

### a. Treaties with Foreign Powers.

*Statutes at Large.* Treaties for the period 1778-1845 are to be found in Volume 8 of the *Statutes at Large* (Boston, Little and Brown, 1848). Thereafter, until 1937, they were published in the *Statutes at Large* at the end of each Congress. Volume 18, part 2 (*Revised Statutes of the United States relating to the District of Columbia, etc.*) contains "The Public Treaties in force on the first day of December, 1873." Since 1937, they have been published at the end of each session. Prior to 1911 (Volume 47) executive agreements issued in the *Treaty Series* were included in the *Statutes at Large*. Beginning with Volume 47 other international agreements including executive agreements have been published as a separate section in the *Statutes at Large*.

*Treaty Series.* From 1908 to 1945, the Department of State issued separate treaty prints in pamphlet form commencing with No. 489. Most treaties and other agreements proclaimed earlier than 1908 were reprinted and arranged chiefly by country in alphabetical order and printed in the *Treaty Series* as Numbers 1 through 488. Subsequent to October 1, 1929, the *Treaty Series* was limited to agreements submitted to the Senate.

*Executive Agreement Series.* This series comprised the official texts of promulgated international agreements (other than treaties) to which the United States is a party, such as are entered into by an exchange of notes, or such as the President is empowered to ratify or proclaim without the advice and consent of the Senate. Prior to October 1, 1929, these agreements were usually included in the *Treaty Series*.

*Treaties and Other International Acts Series.* The *Treaty Series* and the *Executive Agreement Series* have been combined in this series, which was inaugurated to make available in a single series texts of treaties and other instruments establishing or defining relations between the United States and other countries. The *Treaties and Other International Acts Series* begins with No. 1501, the combined numbers in the *Treaty Series* and *Executive Agreement Series* having reached

1500, the last number in the *Treaty Series* being 994 and the last number in the *Executive Agreement Series* being 506.

Other Department of State Series. The Department of State publishes other international acts in the following series:

*Arbitration Series*, 1929 to date.

*Commercial Policy Series*, 1934 to date.

*Conference Series*, 1929 to date.

*European Series*, 1929 to date.

*Far Eastern Series*, 1936 to date.

*Inter-American Series*, 1936 to date.

*Latin American Series*, 1929-1936.

*Map Series*, 1929 to date.

*Treaty Information*, October 1929 to June 1939. Published by the State Department monthly. Contains condensed information regarding treaties, conferences, decisions interpreting treaties, etc. It was superseded by:

*The Department of State Bulletin*, a weekly publication. July 1939 to date.

*Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers*, was published under the direction of the Senate Committee on Foreign Relations. It includes:

1776-1909, vols. 1 and 2, compiled by Wm. M. Malloy. (S. Doc. 357, 61st Cong., 2nd sess.) 1910.

1910-1923, vol. 3, compiled by C. F. Redmond. (S. Doc. 348, 67th Cong., 4th sess.) 1923, superseding a 1913 volume compiled by Garfield Charles. (S. Doc. 1063, 62nd Cong., 3rd sess.).

1923-1937, compiled by Edward J. Trenwith. (S. Doc. 134, 75th Cong., 3rd sess.) 1938.

*Treaties and Other International Acts of the United States*, edited by Hunter Miller, Washington, Govt. Print. Off., 1931- (in progress) Volume 1 (short print), plan of edition, lists, and tables; Volume 2, Documents 1-40, 1776-1818; Volume 3, Documents 41-79, 1819-1835; Volume 4, Documents 80-121, 1836-1846; Volume 5, Documents 122-151, 1847-1851; Volume 6, Documents 152-172, 1852-1855; Volume 7, Documents 173-200, 1855-1858. Volume 7 was published in 1942. This compilation which is being issued under the authority of the Department of State will include all treaties which have ever been in force except those with Indian tribes and postal conventions generally, through December 31, 1930.



*International Legislation, a Collection of the Texts of Multipartite International Instruments of General Interest, beginning with the Covenant of the League of Nations, 1919/21-1932/34*, edited by Manley O. Hudson. Washington, Carnegie Endowment for International Peace, 1931-37. vols. 1-4.

*League of Nations Treaty Series, 1920-* . Geneva, League of Nations, 1920- . This series covers treaties and other international agreements arranged and published in the order in which they were registered with the Secretariat of the League.

There are also useful collections of treaties and other materials on special subjects such as the following:

*Handbook of Commercial Treaties*, digests of commercial treaties, conventions, and other agreements of commercial interest between all nations. Washington, Govt. Print. Off., 1922 (reprint 1923).

*A Collection of Neutrality Laws, Regulations, and Treaties of Various Countries*, edited and annotated by Francis Deák and Philip C. Jessup. Washington, Carnegie Endowment for International Peace, 1939. 2 vols.

*A Collection of Nationality Laws of Various Countries, as Contained in Constitutions, Statutes, and Treaties*, edited by Richard W. Flournoy, Jr. and Manley O. Hudson. New York, Oxford University Press, 1929.

b. Treaties with the Indian Tribes.

There is at present no complete single collection of all Indian treaties as such. Treaties and laws may be found in the following publications:

*Statutes at Large*, vol. 7. Treaties prior to 1845.

*Indian Affairs, Laws and Treaties* compiled to June 29, 1938, and edited by Charles J. Kappler, contains both ratified and unratified treaties made with the Indians. It was published as follows:

Vol. 1-2 as S. Doc. 319, 58th Cong., 2d sess. (1904);

Vol. 3 as S. Doc. 719, 62nd Cong., 2d sess. (1913);

Vol. 4 as S. Doc. 53, 70th Cong., 1st sess. (1929);

Vol. 5 as S. Doc. 194, 76th Cong., 3d sess. (1941).

*Statutory Compilation of Indian Law Survey*, edited by Felix Cohen. 46 mimeographed volumes. Washington, Govt. Print. Off., 1940. This compilation, which was published under the authority of the Department of the Interior, contains some unpublished but valid treaties and the most complete collection of statutory materials on Indian law.

## 3. Statutes.

## a. Federal Statutes.

## (1) Enactments of More Than One Year's Standing.

*Statutes at Large*<sup>1</sup> (cited: Act of June 1, 1789, 1 Stat. 23). The official edition of the laws of the United States. They contain public acts and resolutions (now called "public laws"); private acts and resolutions (now called "private laws"), concurrent resolutions, treaties, other international agreements, proclamations, any constitutional

<sup>1</sup> Statutes at Large. Under the authority of a joint resolution of March 3, 1845 (No. 10, 5 Stat. 798), Little and Brown published a set of eight volumes of Statutes edited with references and notes by Richard Peters: Volumes 1-5, Public Laws, 1st-28th Cong., 1789-1845, and Index; Volume 6, Private Laws, 1st-28th Cong., 1789-1845; Volume 7, Indian Treaties, 1778-1845; Volume 8, Treaties with Foreign Nations, 1778-1845, and General Index.

From time to time nine supplementary volumes were published bringing the laws down to 1874.

Volume 9, Public and Private Laws, Treaties, etc., 29th-31st Cong., 1845-51; Volume 10, Public and Private Laws, Treaties, etc., 32nd-33rd Cong., 1851-55; Volume 11, Public and Private Laws, Treaties, etc., 34th-35th Cong., 1855-59; Volume 12, Public and Private Laws, Treaties, etc., 36th-37th Cong., 1859-63; Volumes 13-17, Public and Private Laws, Treaties, etc., 38th-42nd Cong., 1863-73; Volume 18 consists of: Part 1. Revised Statutes in force December 1, 1873, enacted June 22, 1874. Part 2. Revised Statutes relating to the District of Columbia and Post Roads . . . with the Public Treaties in force December 1, 1873. Part 3. Laws for 43rd Congress.

Under an act of June 20, 1874 (18 Stat. 113), the publication was taken over by the Government; and one volume has been published for each Congress beginning with volume 18 for the 43rd Congress. From volume 32 (57th Cong.) to volume 50 (75th Cong.), the volumes consisted of two parts: Part 1, Public Acts and Joint Resolutions; Part 2, Private Acts, Concurrent Resolutions, Treaties, Proclamations, and Amendments to the United States Constitution, etc. An act of June 20, 1936 (49 Stat. 1551) provided that the Statutes at Large should appear at the end of each session and that the practice of publishing pamphlet copies of Session Laws after each session should be discontinued.

Volume 44 consists of: Part 1. United States Code, 1926 (see p. 179). Part 2. Public Laws and Resolutions. Part 3. Private Laws and Resolutions, Concurrent Resolutions, Treaties, and Proclamations.

Volume 53 consists of: Part 1. Internal Revenue Code approved February 10, 1939. Part 2. Public Laws, Reorganization Plans. Part 3. Private Laws, etc.

Volume 54 consists of: Part 1. Public Laws, Reorganization Plans. Part 2. Private Laws, etc.

amendments, and occasionally codifications and reorganization plans. They are official and conclusive evidence of the law therein contained.<sup>2</sup>

*Revised Statutes*, 1873 (cited: Rev. Stat. (1873), sec. 1). These contain the permanent law in force December 1, 1873. They are the only real codification of the laws of the United States because their arrangement and restatement were enacted with the provision that all previous statements embodied therein were repealed.<sup>3</sup> By the Act of June 20, 1874 (18 Stat. 113) they were made legal evidence of the laws and treaties contained therein. However, by reason of inaccuracies later discovered a second corrected edition was published in 1878. Although this is the edition usually cited it was made only *prima facie* evidence of the law by the Act of March 9, 1878 (20 Stat. 27).

There are two supplements to the *Revised Statutes*.

*Supplement to the Revised Statutes*, vol. 1, 2nd ed., 1874-1891 (1891); and

*Supplement to the Revised Statutes*, vol. 2, 1892-1901 (1901).

Although they are called supplements to the *Revised Statutes* the laws contained therein are merely reprints taken directly from the *Statutes at Large* and arranged chronologically but not codified. These supplements were made *prima facie* evidence of the law by the acts of June 7, 1880 (21 Stat. 308) and April 9, 1890 (26 Stat. 50).

*United States Code* (cited: 1 U. S. C., 1946 ed., sec. 1). This Code contains a consolidation and codification of all general and permanent laws of the United States in force January 2, 1947. It supersedes the editions of 1926, 1934, and 1940, and their supplements. It is provided by the Act of March 2, 1929 (45 Stat. 1541, 1 U. S. C., 1946 ed., sec. 54), that "The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish *prima facie* the laws of the United States, general and permanent in their nature, in force on the day preceding

<sup>2</sup> Act of August 8, 1846, 9 Stat. 76; Act of January 12, 1895, 28 Stat. 615; Act of June 20, 1936, 49 Stat. 1551; Act of June 16, 1938, 52 Stat. 760.

<sup>3</sup> Rev. Stat. (1873), sec. 5596.

the commencement of the session following the last session the legislation of which is included."

The *Code* is divided into 50 titles which are in turn subdivided into chapters and sections. The first six titles deal with the legislative and executive branches of the Government. Titles 7-50 are arranged alphabetically from Agriculture to War. The sections are not consecutively numbered throughout the *Code* as in the *Revised Statutes*. Each new title begins with a "Section 1."

New editions are to be published not oftener than once in five years, and the edition so published is to be kept up-to-date by a cumulative supplement issued after each session of Congress (cited: 2 U. S. C., 1946 ed., Sup. III, sec. 3).

The *United States Code* often differs slightly in wording from the official *Statutes at Large*, which are final evidence of the law where differences exist.

There have been authorized by Congress at various times codifications of parts of the law, which supersede and repeal sections of the *Revised Statutes* or of the *U. S. Code* and subsequent laws: The codifications to date are as follows:

The Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088-1159, 18 U. S. C. It consists of 345 sections and as amended appears in Title 18 of the *U. S. Code* and current *U. S. Code Supplement*. However, the section numbers in the *U. S. Code* do not correspond to those in the Criminal Code.

The Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087-1169. This consists of 301 sections and as amended appears in Title 28 of the *U. S. Code* and current *U. S. Code Supplement*. As in the case of the Criminal Code, the sections of the *U. S. Code* do not correspond to those of the Judicial Code.

The Internal Revenue Code Act of February 10, 1939, c. 2, 53 Stat. Pt. 1, 26 U. S. C., 1946 ed. (cited: I. R. C. (1939), sec. 1). This Code is intended to contain "all the United States statutes of a general and permanent nature relating exclusively to internal revenue, in force on January 2, 1939; also such of the temporary statutes of that description as relate to taxes the occasion of which may arise after the enactment of the Code. These statutes are codified without substantive change and with only such change of form as is

required by arrangement and consolidation. The title contains no provision, except for effective date, not derived from a law approved prior to January 3, 1939." It is "the first Federal act of its kind (and the longest), since the Revised Statutes of the United States, approved June 22, 1874."

The Nationality Act of 1940 was enacted as chapter 876 of 54 Stat. 1137 on October 14, 1940, and is included as amended in 8 *U. S. Code* as Sec. 501-907. It is a revision and codification of the nationality laws which repeals all other laws in conflict with it.

The process of revision and codification is currently in progress. In addition to the subjects mentioned above Title 1, General Provisions (P. L. 278, 80th Cong.); Title 4, Flag and Seal, Seat of Government, and the States (P. L. 279, 80th Cong.); Title 6, Official and Penal Bonds (P. L. 280, 80th Cong.); Title 9, Arbitration (P. L. 282, 80th Cong.); Title 17, Copyrights (P. L. 281, 80th Cong.), have already been enacted, and Title 18, Criminal Code and Criminal Procedure (HR 3190, 80th Cong.), passed House May 12, 1947; Title 28, Judicial Code and Judiciary (H.R. 3214, 80th Cong.), passed House July 7, 1947.

*United States Code Annotated* (cited: 1 U. S. C. A. sec. 1). This set of 60 odd volumes is privately printed. The original volumes are identical in text and order of titles with the *U. S. Code* (1926 ed.). They are supplemented annually by cumulative pocket parts which contain amendments and additions to the laws as well as new and revised annotations. During sessions of Congress these pocket parts are in turn brought to date by a cumulative quarterly pamphlet supplement, the fourth of which is broken up each year into titles and cumulated with the proper pocket parts. From time to time, as the size of the pocket parts becomes cumbersome, replacement volumes are issued cumulating the text and annotations of the original volumes and pocket parts. This set supersedes the *United States Compiled Statutes* and the *Federal Statutes Annotated*.

*Federal Code Annotated* (cited: 2 F. C. A., (1936) Title 1, sec. 1). This set is also privately printed. Though the text of the original volumes

is identical with that of the *U. S. Code (1934 ed.)*, related titles are included in the same volume rather than arranged alphabetically as in the Code. There is a Ten Year Cumulative Supplement (in 4 Books) which brings material to January 30, 1947. The set is kept up-to-date by pocket parts, by pamphlet supplements, and by new volumes replacing old ones.

Mason's *United States Code (Annotated)* (cited: Mason's Code (1926), Title 1, sec. 1). The set consists of three volumes published in 1926 and Supplements Nos. 1-5 (in 6), covering the period 1925 through April 1940. It is kept up-to-date by Mason's Code Quarterly pamphlets (not cumulative). There are no pocket parts. A revision is in progress. In the meantime a complete set consists of the following: Bound volumes 1-3; Bound supplements 1-4, 4B, 5; Grey pamphlets, vol. 13, nos. 1-4 through vol. 18, nos. 1-4 and vol. 19, nos. 1-2; Blue pamphlets, vol. 1, no. 4 only through vol. 7, no. 4 only, and vol. 8, nos. 1-3; 1941 pam. supp. to Supp. 4B and Orange Pamphlets (for Supp. 4B), vol. 2, no. 4 only through vol. 6, no. 4 only and vol. 7, nos. 1-3. There have been no issues since January, 1948.

(2) Federal Laws on Special Subjects.

There are various collections of Federal laws on special subjects. Some of these, both annotated and unannotated, are prepared by the agency charged with the administration of those laws. Others are compiled more or less in answer to popular demand by the Superintendent of the Document Room of the House of Representatives. Such compilations may usually be purchased from the Superintendent of Documents, often for a nominal price. They are listed by subject in the Government Printing Office Price List 10, "Laws, Regulations, Decisions of Courts, Boards, and Commissions," and in the semi-monthly list and *Monthly Catalog* as published.

(3) Federal Laws Affecting the Indians.

*Indian Affairs, Laws and Treaties*, compiled by Charles J. Kappler. 5 vols.

*Statutory Compilation of Indian Law Survey*, edited by Felix Cohen. 46 vols., mimeographed. This is the most complete collection of statutory Indian law. In addition to the material to be found

in Kappler it includes a large mass of repealed legislation and a considerable body of special legislation.

There are also collections of laws passed by the various Indian tribes. These are listed in two bibliographies:

"Preliminary Check List of the Laws of the Indian Tribes," by Robert Bowie Anderson, in 34 *Law Library Journal* 126-148, July, 1941.

*A Bibliography of the Constitutions and Laws of the American Indians*, by Lester Hargrett. Cambridge, Harvard Univ. Press, 1947.

(4) Recent Enactments.

*Slip Laws.* Individual acts are published separately in a form popularly known as Slip Laws soon after their approval by the President. There are two current series:

Public Acts (cited: Public Law 1, 78th Cong., sec. 2 (1943));

Private Acts (cited: Private Law 1, 78th Cong., sec. 1 (1943)).

The other two series Public (Joint) Resolutions (cited: Public Res. No. 12, 76th Cong., 1st sess., ch. 104 (1939)), and Private (Joint) Resolutions (cited: Private Res. 1, 75th Cong., 1st sess., sec. 1 (1937)), were discontinued beginning with the 77th Congress.

*Session Laws.* Formerly, at the end of each session of Congress, the laws were reprinted in temporary paper bound pamphlets labeled Session Laws. These pamphlets were replaced at the end of each Congress by permanent bound volumes called Statutes at Large. The Session Laws were discontinued in 1936.

*United States Code Congressional Service*, formerly *Current Service*. This service, which is issued once a month by the publishers of the *United States Code Annotated*, reprints in each issue the full text of all public laws for the period covered. It adds to the information found in the Slip Laws, the popular titles of the acts and is cumulated into bound volumes. Laws from this service are cited in the same manner as Slip Laws. It is advisable, however, when quoting, to quote the Slip Laws because the text, as it is reprinted in the service, is only *prima facie* evidence of the law which can be rebutted by the introduction of the official text as found in the Slip Laws.

*United States Law Week*, published by the Bureau of National Affairs, Inc. since September 1933. This periodical reprints in full in its Statutes Section important statutes enacted during the week covered.

(5) Pending Enactments.

Copies of bills and resolutions may usually be obtained from the Senate and House Document Rooms in the Capitol.

Files of bills and resolutions introduced in the current session are maintained in the Library of Congress and in certain of the large law libraries of the country.

Files of bills and resolutions introduced in previous sessions are maintained in the offices of the Secretary of the Senate and Clerk of the House of Representatives, also in the Library of Congress.

b. State Statutes.

(1) Pending Enactments.

Bills. Copies of bills may usually be obtained from the clerks of the state legislature. Files of current bills are usually maintained in the State Library and in some of the larger law libraries within the state. Files of bills for earlier sessions are sometimes available in the State Library, or the State Legislative Reference Bureau.

(2) Recent Enactments.

Session Laws. After the close of the legislative session in each state, the enactments of that session, which in most cases have already been issued currently as "slip laws" or published in some legal newspaper, are arranged chronologically, indexed, and published in a bound volume by the state or under its authority. Such publications are commonly called session laws, although in some states they are otherwise designated. For example, in Connecticut they are called *Public Acts*, in Florida, *General Acts*, and in Wisconsin, *Session Laws*. The laws in them are generally cited: Ala., Laws of 1946, ch. 25.

(3) Revisions, Compilations, Consolidations, etc.

The legislatures of the respective states have provided, at intervals, for the rearrangement or restatement, or, both of all the general and permanent statutory enactments then in force. In some instances the provision is merely for republishing the statutes in chronological order omitting repealed and obsolete enactments; in others it is for



republishing the statutes arranged alphabetically or systematically by subject matter; and in still others for rewriting and restating existing law with necessary amendments. In the last instance, the restatement is enacted by the legislature in which case it is conclusive evidence of the law. Usually, however, provision is made for a mere revision or compilation which is to be only *prima facie* evidence which can be rebutted by producing the original session law in case of conflict.

(4) Codes.

The term "code" is often loosely used to denote a revision, compilation or consolidation. Strictly used it denotes a publication in which the laws are not only consolidated but also combined with existing case law on the subject. Some states such as California have codified their Civil, Penal and Political and other laws. Others have codified only their adjective law. The latter are known as "Code States."

A searcher should always examine the consolidation compilation, revision, or code being used to ascertain whether or not the designation as such is truly indicative of its status as evidence of the law.

#### 4. Administrative Rules and Regulations.

##### a. Federal Material.

##### (1) Current Publications.

*Federal Register* (cited: 9 F. R. 13, 315 (November 10, 1944)). Publication of the *Federal Register* was authorized by the Act of July 26, 1935, c. 417, 49 Stat. 500; 44 U. S. C., 1940 ed., secs. 301-310, 311-314. Prior to the date of its first issue (March 14, 1936) there was no central publication of documents within the executive branch of the Government.<sup>4</sup> In it are published all documents which implement, interpret, or apply Federal statutes, that is, Presidential Proclamations, Executive Orders, rules and regulations of executive departments and administrative agencies, and the decisions, orders, and rulings as well as the rules of practice and evidence of the administrative tribunals which have general applicability and the force of law.<sup>5</sup>

<sup>4</sup> For a description of conditions prior to the passage of the Federal Register Act, see Griswold, 48 Harv. L. Rev. 198 (1934).

<sup>5</sup> For a statement of the need for still further improvement, see Wigmore, 25 A. B. A. Jour. 25 (1939).

It was further provided by Section 3 (a) of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 244; 5 U. S. C. 1940 ed., sec. 1002 that:

"Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency.

"(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

By section 7 of the Federal Register Act it is provided that "publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this Act and the regulations prescribed hereunder relative to such document have been complied with. The contents of the *Federal Register* shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number."

The *Federal Register* is issued daily except Sunday and Monday and days following holidays. Prior to June 3, 1938 bound volumes differing in pagination from the daily numbers were issued at

the end of each year. They included tables of parallel reference to the pages in the daily issues. Since that date libraries have gathered the daily issues and bound them.

*The Code of Federal Regulations of the United States of America* (cited: 1 C. F. R. 1.15 (1939)). The Act of June 19, 1937, amending section 11 of the Federal Register Act provided that the codified rules and regulations of Government agencies having general applicability and legal effect which were in force on June 1, 1938 should be published as *The Code of Federal Regulations*. The *Code* is *prima facie* evidence of the text of the documents and of the fact that they were in force and effect on that date.<sup>6</sup> It is divided into 50 titles and analogous to the 50 titles of the *U. S. Code*. Each Title is divided into Chapters, each of which is assigned to a particular agency according to the subject matter of its regulations. Since the rules and regulations of an agency may well cover several fields, they will be found classified under several different titles.

*Cumulative Supplement*, 1943 (cited: 1 C. F. R., Cum. Supp., 2.2 (1943)). In compliance with the Act of June 19, 1937, 50 Stat. 304 (cited supra), a Cumulative Supplement was issued in 1943, codifying all documents issued from June 2, 1938, through June 1, 1943, and superseding the 1938, 1939, 1940, 1941 Supplements. The Preface states that it should be used in conjunction with the first edition of the Code and in conjunction with subsequent annual Supplements, and with the daily issues of the *Federal Register*.<sup>7</sup>

The *United States Code Congressional Service* and the *United States Law Week* publish selected rules and regulations of Government agencies.

(2) Other Current Publications.

Other than the material published in the *Federal Register* and *Code of Federal Regulations* or sold at the Government Printing Office, much important material is available in processed form (mimeographed, multigraphed, etc.), on request to the issuing agency.

<sup>6</sup> Act of June 19, 1937, 50 Stat. 304, amending sec. 11 (a) of the act of July 26, 1935, 49 Stat. 500.

<sup>7</sup> For an article on the use of the Federal Register and the Code of Federal Regulations and the method of locating in the Code material which has been published in the Register, see Wigmore, 29 A. B. A. Jour. 10 (1943).

## (8) Proclamations, Executive Orders and Decrees.

## (a) Presidential Proclamations and Orders.

Presidential documents affecting the public at large are in two forms, Proclamations and Executive Orders.

Presidential Proclamations (cited: Ex. Proc. No. 1477 (August 14, 1918) ), which are executive in nature, are used in matters of widespread interest. Not all have the force of law.

Executive Orders (cited: E. O. No. 8136, 4 F. R. 2044 (May 17, 1939) ), which are generally legislative in character, are used in the regulation of the administrative details of government business or in setting up and establishing the duties of executive departments and independent agencies. Although they have never been defined in any statute or regulation their form and the method of their promulgation has been prescribed.<sup>7a</sup>

Some Proclamations and Orders were issued in an unnumbered series. These are cited simply by date of issue and a descriptive phrase. There is no complete published collection of Proclamations and Executive Orders.

*Statutes at Large.* Proclamations for the period 1789-1855 are reprinted in volumes 3, 4, 5, 9 and 10 of the *Statutes at Large*. Volume 11 purports to contain those which had been omitted in the earlier volumes and in addition all those issued during the Congresses which it covered. Commencing with volume 11, each volume supposedly contains the proclamations for its respective period. It should be borne in mind, however, that not all of the earlier proclamations were filed with the Department of State, hence not all are published in the *Statutes at Large*. At the present time all proclamations are printed in a separate section of the *Statutes at Large*, usually with the private laws. They are indexed under the heading, "Proclamations" and also according to subject matter. Executive Orders are not generally printed in the *Statutes at Large*.

*Federal Register.* Since March 14, 1936, all proclamations and Executive orders ". . . except such as have no general applicability and legal effect or are effective only against Federal agencies and persons in their capacity as officers, agents, or

<sup>7a</sup> E. O. 6247 (Aug. 10, 1933) as amended by E. O. 6497 (Dec. 15, 1933). See also E. O. 5220 (Nov. 8, 1929) and E. O. 5658 (June 24, 1931).

employees thereof . . ." are published in the daily issues of the Federal Register.

*Code of Federal Regulations.* Proclamations and Executive Orders included in the *Code of Federal Regulations* are to be found under the various titles and chapters indicated by the subject matter. In the *C. F. R. Cumulative Supplement* (1943) the text of all Proclamations and Executive Orders for period June 2, 1938 through June 1, 1943, is to be found in Title 3. Subsequent material is to be found under Title 3 in later supplements (1943 to date). The *Code of Federal Regulations* also contains other Presidential documents in full.

Proclamations and Executive Orders included in the *Federal Register* and *Code of Federal Regulations* are not issued separately. Those which are not included are issued separately and may be obtained from the Superintendent of Documents. Regardless of whether it is printed in separate form each is numbered in its proper series. Therefore, numbers missing in the separate issues will be found in the *Federal Register* and *Code of Federal Regulations* and vice versa.

The *United States Code*, the *United States Code Annotated* and the *Federal Code Annotated* include the more important Proclamations and Executive Orders under the Titles indicated by their subject matter.

The *United States Code Congressional Service* contains the full text of all current Proclamations and of Executive Orders of a public nature, as well as of selected Messages of the President.

The *U. S. Law Week* contains selected items.

*A Compilation of the Messages and Papers of the Presidents 1789-1897*, 10 vols. (H. Misc. Doc. 210, 53d Cong., 2d sess., 1896-1899), edited by James D. Richardson, purports to include Executive Orders, Proclamations and other Presidential papers for the period 1789-1897. However, there are many omissions. The Appendix in volume 10 supposedly contains papers omitted in volumes 1-9 and brings the set down to 1899. Volume 10 also includes an index. Private editions of this same set, varying in number of volumes, purport to bring the set down to 1927. Contrary to the impression given by their title pages, they contain no official material later than 1899. Because of lack of uniformity in volume numbering, it is inadvisable to cite these sets by volume number.

Reorganization Plans. By the Act of April 3, 1939 (c. 36, 53 Stat. 561), Congress created a new type of legislation. Under this act and a later one (Act of December 20, 1945, c. 582, 59 Stat. 613), the President was authorized to submit to Congress in accordance with certain specifications plans for the reorganization of some of the Government agencies. It was provided that if Congress did not disapprove of these plans within a specified period they were to become law. Acting under this authority the President has submitted five plans under the first act all of which became law, and three under the second act the second and third of which became law. These Reorganization Plans are to be found in 53 Stat. 1423-36, 54 Stat. 1213-38 and 60 Stat. 1095-1102 and in C. F. R. Cum. Supp. (1943) Title 3, c. 4, pp. 1288-1305 and C. F. R. Supp. 1946, Title 3, c. 4, pp. 192-197.

(4) Publications of Particular Agencies.

Many important documents governing the internal management of Federal agencies or affecting the public at large which for some reason have not been filed with the Archivist of the United States are available at the offices of the particular issuing agency. Most of the remaining documents may be purchased from the Government Printing Office, or, if out of print, may be consulted at the Library of Congress or one of the depository libraries in other parts of the country.

(5) Historical Material.

Much material having the force of law, issued prior to March 14, 1936, but which because of the difficulty of codification or for other reasons has not yet been incorporated in the *Code of Federal Regulations* can be consulted on application to the Office of the Archivist of the United States. The National Archives Building and the services of its expert staff are available to the public as well as to the Government agencies.

(6) Unofficial Publications.

Both the *United States Code Congressional Service* and the *United States Law Week* publish currently in addition to Presidential proclamations and executive orders, other selected administrative material.

*Executive Orders and Administrative Material.* Indianapolis, Bobbs-Merrill Co., 1945. Selected

documents from 1932 to Nov. 1, 1944, with a Table of Public Acts keyed to *P. C. A.*, a Table of Acts by Popular Names, and an index.

b. State.

State administrative agencies usually issue their rules and regulations in pamphlet or bound form. This material is distributed either by the agency directly or by the state printer.

Loose-leaf services on the various phases of state administrative law usually carry the rules and regulations of the state agencies, on their respective subjects, in conjunction with the statutes and procedural rules.

Governors' proclamations, orders and messages may usually be found in the volumes of session laws and in the official compilation of state documents. They are also published in compilations of the papers of a single governor or of the governors over a given period.

c. Municipal.

Municipal administrative agencies usually issue their rules and regulations in pamphlets which are obtainable either directly from the agency or from the division of printing.

5. Rules of Court.

The various Federal and State courts, acting under the authorization of Congress and the State legislatures respectively, or in the exercise of what in some jurisdictions is assumed to be their inherent power at common law, from time to time promulgate rules for the conduct of litigation which have substantially the force of legislative enactments. Such rules are usually published as an appendix to the reports of decisions of the respective courts, as they are promulgated or amended.

a. Federal Courts.

(1) The Supreme Court.

The Supreme Court adopted on February 13, 1939, the *Revised Rules of the Supreme Court of the United States*, which became effective on February 27, 1939.

(2) The U. S. Circuit Courts of Appeals.

The U. S. Circuit Courts of Appeals are authorized by the Act of March 3, 1891, c. 517, sec. 2, 26 Stat. 826, and the Act of March 3, 1911, c. 231, sec. 122, 36 Stat. 1132; 28 U. S. C., 1940 ed., sec. 219 (Jud. Code, Sec. 122) "to establish all rules and regulations for the conduct of the business of the court within the jurisdiction as conferred by law."

## (3) District Courts of the United States.

Rules of Civil Procedure. The Act of June 19, 1934, c. 651, 48 Stat. 1064; 28 U. S. C., 1940 ed., sec. 723b and 723c, authorized the Supreme Court to adopt Rules of Civil Procedure for the District Courts of the United States which would "unite the general rules prescribed by it for cases in equity with those in actions at law."

It was further prescribed that "Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

The Rules were so submitted in January, 1938, and became effective September 16, 1938. New rules so submitted take effect at the end of each session if no adverse action has been taken on them by Congress. Thirty-four of the eighty-six rules have been changed by amendments effective March 19, 1948.

Rules of Criminal Procedure. The act of June 29, 1940, ch. 445, 54 Stat. 688; 18 U. S. C., 1940 ed., sec. 687 and the Act of Nov. 21, 1941, c. 492, 55 Stat. 779; 18 U. S. C., 1940 ed., sup. V, sec. 689) authorized the Supreme Court to adopt Rules of Criminal Procedure for the District Courts of the United States.

It further provided that "Such rules shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect." They were so reported in January, 1945, and became effective March 21, 1946.

Admiralty Rules. The Supreme Court was authorized by the Act of March 3, 1911, ch. 231, sec. 291, 36 Stat. 1167, 28 U. S. C., 1940 ed., sec. 723, to adopt Rules of Practice in Admiralty and Maritime Cases. These rules which became effective on March 7, 1921, were revised to May 6, 1946.

Bankruptcy. The Supreme Court was authorized by the Act of July 1, 1898, ch. 541, sec. 30, 30 Stat. 554, to prescribe all necessary rules, forms, and orders for bankruptcy proceedings. These General Orders and Forms in Bankruptcy became effective January 2, 1899. They were amended and extended by Order of the Supreme Court, effective February 13, 1939.



CHART SHOWING WHERE TO FIND FEDERAL RULES OF COURT  
(As of March, 1943)

	U. S. C. 1940 ed.	U. S. C. A.	F. C. A.	Mason's	West Digest	Co-op. Digest
U. S. Supreme Court		T. 28, foll. Sec. 354	Vol. 8A c. 3	Supp. 4B p. 1 and pamphlets	Vol. 16 p. 1 & pkt. pt.	Vol. 11 p. 4 & pkt. pt.
U. S. Circuit Courts of Appeals			Vol. 8A c. 4-13	Supp. 4B p. 23 and pamphlets		Vol. 11 p. 225 ff.
U. S. District Courts —Civil	T. 28, foll. Sec. 723c	T. 28, foll. Sec. 723c	Vol. 8A C. 15	Supp. 4B p. 167 and pamphlets	Vol. 16 p. 211	Vol. 11 p. 363
U. S. District Courts —Criminal		T. 18, foll. Sec. 687	Vol. 8A c. 2		Vol. 16 p. 435	Vol. 11 1946 pkt. pt.
U. S. Courts of Appeals for District of Columbia			Vol. 8A c. 14	Supp. 4B p. 147 and pamphlets		Vol. 11 p. 205
General Orders and Forms in Bankruptcy		T. 11, foll. Sec. 53	Vol. 3 T. 11, foll. Sec. 53		Vol. 16 p. 45	Vol. 11 p. 91
Admiralty	T. 18, foll. Sec. 723	T. 28, foll. Sec. 723	Vol. 8A c. 19	Supp. 4B p. 357 and pamphlets	Vol. 16 p. 175	Vol. 11 p. 59
Declaratory Judgments Act— See Fed. Rules Civ. Proc. R-37	T. 28 Sec. 400	T. 28 Sec. 400	Vol. 8 T. 28 Sec. 400 Vol. 8A c. 1	Supp. 4B p. 443 and pamphlets		
Trial of Cases Before Commissioners						
Practice & Procedure After Plea of Guilty (superseded by Crim. Rules)	T. 28, foll. Sec. 688				Vol. 16 p. 495	Vol. 11 p. 559
Old Equity Rules		T. 28 Sec. 723 Appx.		Supp. 4B p. 273 and pamphlets		
Annotations to Old Circuit and Dis- trict Court Rules				Supp. 4B p. 407 and pamphlets		

	U. S. C. 1940 ed.	U. S. C. A.	F. C. A.	Mason's	West Digest	Co-op. Digest
Court of Claims			Vol. 8A c. 16	Supp. 4B p. 411 and pamphlets	Vol. 16 p. 683	Vol. 11 p. 185
Court of Customs and Patents Appeals		T. 35 Appx. and pkt. pt.	Vol. 8A c. 17	Supp. 4B p. 423 and pamphlets	Vol. 16 p. 515	
Customs Court		T. 28 fol. 296 in pkt. pt.	Vol. 8A c. 18	Supp. 4B p. 431 and pamphlets		
Tax Court of the U. S.		T. 26 fol. 1111 in pkt. pt.			Vol. 16 p. 733	
Copyright Office		T. 17 pkt. pt.	Vol. 5 T. 17 fol. Sec. 25	Supp. 4B p. 441 and pamphlets	Vol. 16 p. 169	Vol. 11 p. 85
Patent Office		T. 35 pkt. pt.				

Other Federal Rules. The Court of Claims, Customs Court, Court of Customs and Patents Appeals, the Tax Court of the United States, as well as the Interstate Commerce Commission, the Copyright Office and the Patent Office have all adopted rules of procedure.

The Rules for the various courts and amendments thereto are usually published with the decisions in the volumes of reports for the terms in which they were adopted. Such volumes usually carry an extra label on their spines calling attention to the rules.

The Federal Rules of Civil Procedure are to be found in Volume 1 and the Federal Rules of Criminal Procedure in Volume 6 of the *Federal Rules Decisions*. Amendments are published in this reporter soon after they become effective.

The Rules of Civil Procedure are also published in Pike and Fischer's *Federal Rules Service*. Amendments are published soon after they become effective.

The Advisory Committee Report on Proposed Amendments to the Rules of Civil Procedure is to be found on p. 2384 and comments upon it on pp. 2385-2406, and the Federal Rules of Criminal Procedure on p. 2275 of the *United States Code Congressional Service* 1946, bound volume. The Rules for the Emergency Court of Appeals appear on page 498 and Amendments on page 2086 of the 1942 bound volume. And the Rules of the Tax Court of the United States are found on pp. 2059 and 2060 of the 1946 bound volume.

b. State.

Official publications.

Rules of Court are usually published as an appendix to the volume of reports of decisions of the particular courts, which appears next after their promulgation. Pamphlet editions are usually obtainable from the clerks of the particular courts.

Unofficial publications.

Annotated editions of rules of court are often published privately, either as part of local practice manuals or as independent publications.

A useful chart showing the location of rules is published as part of "Court Rules: Where to Find Them" by Helen Van G. Harris in 33 *Law Library Journal* 127-129, July, 1940.

## 6. Rules of Practice and Procedure of Administrative Agencies.

## a. Federal Agencies.

## (1) Official Publications.

In compliance with the Administrative Procedure Act, June 11, 1946, ch. 324, sec. 3, 60 Stat. 238; 5 U. S. C., Sup., sec. 1002, the codified adjective and substantive rules of all agencies were published in Volume 11, part 2, of the *Federal Register*. These codified rules were reprinted in the 1946 *Supplement to the Code of Federal Regulations*. Current changes are published in the daily issues of the *Federal Register*. These are later codified and published in subsequent *Supplements* of the *Code of Federal Regulations*.

Some of the agencies publish their rules in pamphlets which are available on request to the agencies.

## (2) Unofficial Publications.

*C. C. H. Federal Administrative Procedure*, 2d ed. (a loose-leaf service) contains up-to-date information in this field.

*U. S. Law Week*—contains a section on administrative interpretations.

The loose-leaf services in the various fields of administrative control usually carry the procedural rules in force in their respective fields.

## b. State Agencies.

## (1) Official Publications.

Some state administrative agencies issue their rules of practice and procedure in pamphlets which are available on request to the agency.

## (2) Unofficial Publications.

The loose-leaf services which cover the various phases of administrative regulation usually contain the rules of practice and procedure of the respective agencies involved.

## 7. Municipal Charters.

Under the early state governments, municipal charters were acts of the state legislatures. Consequently, they are to be found in the volumes of session laws for the year in which they were approved. Later, however, the states delegated to the electorates of the municipalities the right to adopt Home Rule Charters. The latter, as a general rule, are printed separately under the authority of the municipal governments.

## 8. Municipal Ordinances.

Ordinances passed by the legislative body of a municipality pursuant to delegated authority have the same effect within the municipality as do the enactments of the Federal Congress and the state legislatures in their respective jurisdictions.

Some states, such as New York, publish volumes of Local Laws of Cities as supplements to the session laws. Such is, however, not the general practice. Ordinances are issued by municipalities either separately or in compilations at very irregular intervals with the result that it is difficult not only to discover whether or not there is an ordinance covering a given course of conduct but also to obtain a copy of an ordinance which is known to be in existence. The most likely place to search for them is at the Office of the City, or Town Clerk or of the Legal Department of the municipal government.

At various times in most cities of any size annotated or unannotated compilations, revisions, and codes of municipal ordinances have been published either as official publications or as private ventures.

## 9. Municipal Rules and Regulations.

The rules and regulations of municipal bodies such as the Board of Health, etc., are often issued in pamphlet form and may be obtained on application to the Board, Commission, etc.

## B. REPORTS OF JUDICIAL DECISIONS IN THE UNITED STATES

## 1. Reports of Decisions of Federal Courts.

## a. The Supreme Court.

*United States Reports* (cited: 297 U. S. 110).

1789-1800, Dallas, 4 volumes (1-4 U. S.)

1801-1815, Cranch, 9 volumes (5-13 U. S.)

1816-1827, Wheaton, 12 volumes (14-25 U. S.)

1828-1842, Peters, 16 volumes (26-41 U. S.)

1843-1860, Howard, 24 volumes (42-65 U. S.)

1861-1862, Black, 2 volumes (66-67 U. S.)

1863-1874, Wallace, 23 volumes (69-90 U. S.)

1875-to date, U. S. Reports, beginning with 91 U. S.

Dallas and Cranch were unofficial reporters. Wheaton in 1817 was appointed official reporter, and since that date the decisions of the court have been reported by an official reporter. The reports from 1789 to 1874 inclusive are numbered as volumes 1 to 90 *United States Reports*, but cited by the name of the reporter, e. g.,

16 Peters 1 (U. S. 1842). The reports since 1875 are not cited by the name of the reporter. Current decisions are issued in slip form. A "Preliminary Print" with unrevised text is also published in pamphlet form at intervals throughout the term. These pamphlets are revised for the bound volumes.

*United States Supreme Court Reports, Lawyers' ed.* (cited: 80 L. Ed. 513).

This unofficial publication is a complete reprint of all the Supreme Court cases with annotations thereto. Each book includes several volumes of reports. The official pagination is given in brackets. It is kept current by semi-monthly advance sheets in pamphlet form.

*Supreme Court Reporter* (cited: 56 S. Ct. 374).

This is an unofficial publication reporting the decisions of the Supreme Court beginning with those in 106 U. S. From three to five volumes of the official reports are included in each volume of the Reporter. They are star-paged for official pagination. Current decisions are carried in semi-monthly advance sheets.

b. United States Circuit Courts of Appeals Circuit Courts and District Courts.

United States Circuit Courts of Appeals.

The decisions of these courts from their organization in 1891 to 1920 were reported in *U. S. Circuit Court of Appeals Reports* (cited: 1 C. C. A. 1), 171 vols.

United States Circuit Court.

The decisions of these courts from their organization in 1789 to their abolition in 1912 were reported by individual reporters, and are so cited. (See Hicks, 3d ed. pp. 484-485.)

United States District Courts.

The decisions of these courts were reported from their organization until 1881 by individual reporters. (See Hicks, 3d ed. p. 486.)

*Federal Cases* (cited: *U. S. v. Jarvis*, Fed. Cas. No. 15,468).

This is an unofficial reprint in 30 volumes of all published decisions of the United States Circuit Courts and of the United States District Courts from 1789 to 1879. It has almost entirely superseded the reports from which it was reprinted. The cases are arranged alphabetically and numbered consecutively. They are cited by title and number, rather than by title, volume, and

*Federal Reporter* (March 1880–Nov. 1924) 300 vols. (cited: 32 F. 273 (CC Mo.)) and *Federal Reporter*, 2d Series Nov. 1924 to date), vol. 1– (cited: 1 F2d 1)

This Reporter contains all the published decisions of the United States Circuit Courts from 1880 to 1912, when they were abolished; of the District Courts of the United States from 1880 to 1932; of the United States Circuit Courts of Appeals from their organization in 1891; of the Court of Appeals for the District of Columbia from 1919 to 1934 and of its successor, the United States Court of Appeals for the District of Columbia from 1934 to date; of the Commerce Court from its creation in 1911 until its abolition in 1913; of the United States Court of Customs and Patent Appeals from 1929 to date; and of the United States Court of Claims from 1929 to 1932. It continues the *Federal Cases*. Current decisions are reported in weekly advance sheets.

*Federal Supplement* (1932 to date) (cited: F. Supp.).

This Reporter now carries the decisions of the District Courts of the United States and of the Court of Claims. Current decisions are available in weekly advance sheets.

Other Federal Courts.

U. S. Commerce Court, 1911–1913, 1 vol.

U. S. Court of Claims (cited: 1 Ct. Cl. 1) 1855 to date.

U. S. Court of Customs and Patent Appeals (cited: 18 C. C. P. A. (Customs) 1 or 18 C. C. P. A. (Patents) 1) 1910 to date.

U. S. Customs Court (cited: 1 Cust. Ct. 1) 1938 to date.

U. S. Board of Tax Appeals (cited: 1 B. T. A. 1) 1924–1942, vol. 1–47.

Tax Court of the United States (cited: 1 T. C. 1) 1942 to date.

## 2. Reports of Decisions of the Courts of the Several States, Territories, and possessions of the United States.

### a. So-called Official Reports.

A complete list of the reports of the courts of the several states and territories, the District of Columbia, Puerto Rico, and the Philippine Islands will be found in Hicks, 3d ed., 1942, pages 492–511 and Brandt, *How to Find the Law*, 3d ed., 1940, and in numerous other

easily accessible publications. Detailed bibliographical notes on various editions may be found in Soule's *The Lawyer's Reference Manual*, 1884. Consequently, they will not be enumerated here. It is necessary only to mention that some of the earlier reports in some jurisdictions are by unofficial reporters, and are in such condensed or abbreviated form as to be of less value than current reports. An acquaintance with the system of courts in a specific jurisdiction is sometimes required in order to be able to distinguish the reports of inferior and intermediate appellate courts from those of courts of last resort.

#### b. Unofficial Reports.

*National Reporter System.* This system reports all current decisions of all appellate courts of the United States and of the several states, as well as some decisions of lower courts. Often it contains cases omitted from the official state or Federal reports or publishes in full cases which the official reporter publishes in memorandum form. These reports are usually published long in advance of the official reports. Weekly advance sheets are issued. All opinions of the courts in question are printed in full. The *Supreme Court Reporter*, the *Federal Reporter* (first and second series), and *Federal Supplement*, which are units of the system have been noticed above. The other units of the system are shown below. They report the decisions of the courts of the jurisdictions named, beginning (unless otherwise stated) with page 1 of the indicated volume of the so-called official reports.

#### *Earliest Volumes of State Reports Included in National Reporter System*

##### A. By Reporter Unit

###### ATLANTIC REPORTER

Conn.—Vol. 53	Del.—Pennewill,	N. J.—Law, Vol. 47,
Del.—Chancery Vol.	Vol. 1	p. 349
6	Boyce, Vol. 1	Eq., Vol. 40, p.
Houston, Vol. 7	1 W. W. Harr.	345
Marvel, Vol. 1	Md.—Vol. 64	Penn.—Vol. 110
	N. H.—Vol. 63, p.	Penn. Super.—Vol.
	446	102
		R. I.—Vol. 15



NEW YORK SUPPLEMENT<sup>8</sup>

Abb. N. C.—Vol. 23	Con. Sur.—Vol. 1	Misc. Rep.—Vol. 1
App. Div. (Sup. Ct.) Vol. 1	Gibbons' Sur.—Vol. 1	N. & Cr. R.—Vol. 6
Civ. Proc.—Vol. 14	Power's Sur.—Vol. 1	N. Y. Super. Ct.—Vol. 56
Civ. Proc. Repts., N. S.—Vol. 1	Mills' Sur.—Vol. 1	Silvernail—Vol. 1
Bradbury's Pl. & Pr. R.—Vol. 1	Daly—Vol. 14, p. 497	N. Y. Anno. Cas.—Vol. 1
Dem. Sur.—Vol. 6, p. 413	Hun—Vol. 18, p. 304	N. Y. Lead. Cas. Ann.—Vol. 1

## NORTHEASTERN REPORTER

Ill. (Sup. Ct.)—Vol. 114	Ind. (Sup. Ct.)—Vol. 102	N. Y.—Vol. 99
(App. Ct.)—Vol. 284	Mass.—Vol. 139	Ohio—Vol. 43

## NORTHWESTERN REPORTER

Dak.—Vol. 1	Mich.—Vol. 41	S. D.—Vol. 1
Iowa—Vol. 51	Neb.—Vol. 8, p. 294	Wisc.—Vol. 46
	N. D.—Vol. 1	

## PACIFIC REPORTER

Ariz.—Vol. 1	Kan. Sup.—Vol. 30	Okl. Cr. App.—Vol. 1
Cal. Sup.—Vol. 64	Kan. App.—Vol. 1	
Cal. App.—Vol. 1	Mont.—Vol. 4	Ore.—Vol. 11
Colo. Sup.—Vol. 7	Nev.—Vol. 17	Utah—Vol. 3
Colo. App.—Vol. 1	N. M.—Vol. 3	Wash. St.—Vol. 1
Idaho—Vol. 2	Okla. Sup.—Vol. 1	Wash. Ter.—Vol. 2
		Wyo.—Vol. 3

## SOUTHEASTERN REPORTER

Ga.—Vol. 79	N. C.—Vol. 96	Va.—Vol. 83
Ga. App.—Vol. 1	S. C.—Vol. 26	W. Va.—Vol. 29

<sup>8</sup> From July, 1932, the New York Supplement has included the decisions of the New York Court of Appeals, beginning with Vol. 259, p. 250. Sets sold to New York subscribers, however, include such decisions beginning with June, 1928.

## SOUTHERN REPORTER

Ala.—Vol. 81                      Fla.—Vol. 23                      La. App.—Vol. 1  
 Ala. App.—Vol. 1                La. Ann.—Vol. 39                Miss.—Vol. 64

## B. Alphabetical List by State Reports

From	Date	Reporter	From	Date	Reporter
81 Ala.	1886	So.	47 N. J. Law 349	1885	A.
1 Ala. App.	1910	So.	40 N. J. Equity 345	1885	A.
1 Ariz.	1866	P.	1 N. J. Misc.	1923	A.
47 Ark.	1855	S. W.	3 N. M.	1883	P.
64 Calif.	1883	P.	99 N. Y.	1885	N. E.
1 Calif. App.	1883	P.	229 N. Y.	1928	N. Y. Supp.
3 Calif. Unrep.	1905	P.	1 App. Div.	1888	N. Y. Supp.
7 Colo.	1883	P.	1 Misc.	1888	N. Y. Supp.
1 Colo. App.	1891	P.	23 Abb. N. Cas.	1888	N. Y. Supp.
53 Conn.	1885	A.	1 Bradb.	1888	N. Y. Supp.
1 Dak.	1867	N. W.	1 Con. Sur.	1888	N. Y. Supp.
6 Del. Ch.	1886	A.	14 Daly 497	1888	N. Y. Supp.
1 Boyce	1909	A.	6 Dem. Sur. 413	1888	N. Y. Supp.
1 W. W. Harr.	1920	A.	1 Gibbons' Sur.	1888	N. Y. Supp.
7 Houst.	1884	A.	48 Hun 304	1888	N. Y. Supp.
1 Marv.	1893	A.	1 Mills' Sur.	1888	N. Y. Supp.
1 Pennewill	1897	A.	16 N. Y. Civ.		
			Proc. R.	1888	N. Y. Supp.
49 App. D. C.	1919	F.	7 N. Y. Crim. R.	1888	N. Y. Supp.
23 Fla.	1887	So.	21 N. Y. St. Rep.	1888	N. Y. Supp.
79 Ga.	1887	S. E.	56 N. Y. Super. Ct.	1888	N. Y. Supp.
1 Ga. App.	1907	S. E.	1 Power's Sur.	1888	N. Y. Supp.
2 Idaho	1881	P.	1 Silvernail	1888	N. Y. Supp.
114 Ill.	1885	N. E.	96 N. C.	1887	S. E.
284 Ill. App.	1885	N. E.	1 N. D.	1890	N. W.
1 Ind. Ter.	1896	S. W.	43 Ohio St.	1885	N. E.
102 Ind.	1885	N. E.	20 Ohio App.	1926	N. E.
1 Ind. App.	1890	N. E.	1 Okl.	1890	P.
51 Iowa	1878	N. W.	1 Okl. Cr.	1908	P.
30 Kan.	1883	P.	11 Ore.	1883	P.
1 Kan. App.	1895	P.	110 Pa.	1885	A.
84 Ky. 202	1886	S. W.	102 Pa. Super.	1930	A.
12 Ky. Law Rep.	1886	S. W.	15 R. I.	1885	A.
104 La.	1901	So.	26 S. C.	1886	S. E.
39 La. Ann.	1887	So.	1 S. D.	1890	N. W.
9 La. App.	1924	So.	85 Tenn.	1886	S. W.
77 Me. 408	1885	A.	66 Texas	1886	S. W.
64 Md.	1885	A.	21 Tex. App.	1886	S. W.
119 Mass.	1884	N. E.	1 Tex. Civ. App.	1892	S. W.
41 Mich.	1879	N. W.	31 Tex. Crim. R.	1892	S. W.
26 Minn.	1879	N. W.	4 Willson Civ. Cas.	1889	S. W.
64 Miss.	1886	So.	3 Utah	1881	P.
89 Mo.	1886	S. W.	58 Vt.	1885	A.
94 Mo. App.	1902	S. W.	82 Va. 964	1887	S. E.
4 Mont.	1881	P.	1 Wash. St.	1889	P.
8 Neb. 294	1879	N. W.	2 Wash. Terr.	1880	P.
1 Neb. Unoff.	1901	N. W.	29 W. Va.	1886	S. E.
17 Nev.	1882	P.	46 Wis.	1879	N. W.
64 N. H. 446	1886	A.	3 Wyo.	1883	P.

## SOUTHWESTERN REPORTER

Ark.—Vol. 47	Mo. App.—pt. of	Tex.—Vol. 66
Ind. Ter.—Vol. 1	Vol. 93	Tex. App.—Vol. 21
Ky.—Vol. 85	Vol. 94	Tex. Civ. App.—
Mo. Sup.—Vol. 89	Tenn.—Vol. 85	Vol. 1
	Tenn. App.—Vol. 16	Tex. Cr. App.—Vol.
		31

## 3. Reports of Selected Decisions of Federal and State Courts (General).

These are series of cases believed by the editors and compilers to be of general value and authority, dealing usually with questions which are of more than local value, or which are novel, or upon which there is a conflict of authority. The volumes in which they are published contain, by way of annotation, much material of secondary authority.

## a. The Trinity Series.

*The American Decisions* (cited: 1 Am. Dec. 1), containing all the cases of general value and authority decided in courts of the several States from the earliest issue (1760) to 1869. San Francisco, A. L. Bancroft & Co., 1878-1888. 100 vols.

*The American Reports* (cited: 1 Am. Rep. 1), containing all decisions of general interest decided in the courts of last resort of the several States. Albany, John D. Parsons, 1871-1886. 60 vols.

*The American State Reports*, (cited: 1 Am. St. Rep. 1), containing the cases of general value and authority . . . decided in the courts of last resort of the several States. San Francisco, Bancroft-Whitney Co., 1888-1911. 140 vols.

b. *The American and English Annotated Cases* (cited: 1 A. & E. Ann. Cas. 1), containing the important cases selected from the current American, Canadian and English reports . . . Northport, L. I., N. Y., The Edward Thompson Co., 1906-1911. 21 vols.

c. *The American Annotated Cases* (cited: Ann. Cas. 1912 A), containing the cases of general value and authority subsequent to those contained in *The American Decisions*, *The American Reports*, and the *American State Reports*. Northport, L. I., N. Y., 1912-1918. 32 vols. (labelled either as volumes 22-53 of *The American and English Annotated Cases* or 1912 A-1918 E of *The American Annotated Cases*). This series represents a consolidation of *The American State Reports* with *The American and English Annotated Cases*.

d. *The Lawyers' Reports Annotated*. Rochester, Lawyers' Co-operative Pub. Co., 1888-1918.

First Series, (cited: 1 L. R. A. 1), 1888-1905. 70 vols. (Also issued in an Extra Annotated Edition of 1913, with *L. R. A. Cases as Authorities* bound in backs of volumes, 1915; and an Extra Annotated Edition of 1922, with the *L. R. A. Cases as Authorities* and additional annotations to 1922 bound in backs of volumes.)

New Series (cited: 1 L. R. A., N. S. 1), 1906-1914. 52 vols.

Third Unit (cited: L. R. A. 1915 A, 1), 1915-1918. 24 vols.

e. *American Law Reports, Annotated* (cited 1 A. L. R. 1). Rochester, Lawyers' Co-operative Pub. Co., 1919 to date. This series represents a consolidation and is a continuation of *The Lawyers' Reports Annotated* with *The American Annotated Cases*. Approximately six volumes are issued each year.

#### 4. Current Reports of Selected Decisions of Federal and State Courts (Special).

##### Admiralty.

*American Maritime Cases*, 1923 to date. Baltimore, American Maritime Cases, Inc., 1923 to date. "A monthly reporter of all cases of interest to shipowners, shippers, underwriters, and the maritime fraternity, from all courts of the United States, Federal and State."

##### Automobile.

*Automobile Cases*, 1938 to date. Chicago, Commerce Clearing House, Inc., 1938 to date. (Insurance Case Series.)

##### Aviation.

*Aviation Cases*, 1822-1945 to date. Chicago, Commerce Clearing House, Inc., 1948 to date.

*United States Aviation Reports*, 1822 to date. Baltimore, U. S. Aviation Reports, Inc., 1928 to date. "An annual collection of all cases, treaties, international agreements, Federal and State statutes relating to aviation in the United States." Beginning with the volume for 1936, it contains English and Canadian cases as well.

##### Bankruptcy.

*American Bankruptcy Reports*, 1899-1923 (49 vols.) and New Series, 1923 to date. Albany, M. Bender and Co., 1924 to date.

##### Carriers.

*Federal Carriers Cases*, 1936-1940 to date. New York, Commerce Clearing House, Inc., 1940 to date. "Selected decisions rendered by the Interstate Com-

merce Commission and Federal and state courts pertaining to Federal motor carrier regulation, with case tables, docket table, citation table, and topical index." It reports all cases under the Motor Carriers Act, 1935.

#### Insurance.

*Insurance Case Series*. Chicago, Commerce Clearing House, Inc., 1938 to date.

*Fire and Casualty Cases* (other than Automobile), 1938 to date.

*Life, Health and Accident Cases*, 1939 to date.

*Insurance Decisions*, 1931 to date. Chicago, Commerce Clearing House, Inc., 1932 to date.

#### Labor.

*Labor Arbitration Reports*, 1946 to date. Washington, The Bureau of National Affairs, 1946 to date. (Supersedes *War Labor Reports*). Awards of Arbitrators, recommendations of fact-finding boards, court decisions on labor arbitration.

*Labor Cases*, 1937 to date. Chicago, Commerce Clearing House, Inc., 1937 to date.

*Labor Relations Reference Manual*, 1935-1937 to date. Washington, The Bureau of National Affairs, Inc., 1937 to date. New developments, laws and regulations, court opinions, and decisions of the National Labor Relations Board, and State Labor Relations Boards.

*Wage and Hour Cases*, 1942 to date. Washington, The Bureau of National Affairs, 1942 to date. Opinions relating to minimum wages, maximum hours, overtime compensation, child labor.

*Wage and Hour Manual*, 1941 to date. Washington, The Bureau of National Affairs, 1941 to date. Laws, rulings, interpretations in wage-hour regulation, including Federal and State statutes and court opinions.

#### Negligence.

*Negligence Cases* (other than automobile), 1939 to date. Chicago, Commerce Clearing House, 1939 to date. (Insurance Case Series).

*Negligence and Compensation Cases, Annotated*, 1912-1937 (vols. 1-39) and New Series, 1937 to date. Chicago, Callaghan and Co., 1912 to date. Selected cases dealing with negligence, employer's liability and workmen's compensation decided by American, English, and Canadian courts.

#### Patents.

*Patent, Copyright, Trade Mark Cases*, 1790 to date. Edited by W. E. Baldwin. Cleveland, Banks-Baldwin Co., 1929 to date. Beginning with Volume 11, it in-

cludes cases on unfair competition. It is kept to date by a pamphlet service.

*United States Patent Quarterly*, 1929 to date. Washington, The Bureau of National Affairs, 1929 to date. Public Utilities.

*Public Utilities Reports, Annotated*, 1915-1933 (101 vols.) and New Series, 1934 to date. Selected decisions and orders of commissions and courts concerning the regulation of public utilities. It is kept to date by advance sheets issued as part of the *Public Utilities Fortnightly*.

Taxation.

*Tax Court Memorandum Decisions*, 1942 to date. Chicago, Commerce Clearing House, 1942 to date. Full official text of all memorandum decisions handed down by the Tax Court of the U. S.

*U. S. Tax Cases*, 1913 to date. Chicago, Commerce Clearing House, 1936 to date.

*American Federal Tax Reports*. New York, Prentice-Hall, 1924 to date.

## 5. Reports of Decisions, Orders, and Rulings of Administrative Bodies.

Boards.

Civil Aeronautics Board.

*Reports* (cited: 1 C. A. B. 1), 1940 to date. Continues Civil Aeronautics Authority.

*Reports* (cited: 1 C. A. A. 1), 1939-40. 1 vol.

Federal Reserve Board.

*Federal Reserve Bulletin*, 1915 to date.

*Digest of Rulings*, 1914-1937. (Includes court decisions.)

National Labor Board.

*Decisions*, 1933-1934. Pts. 1-2.

National Labor Relations Board.

*Decisions*, 1934-1935. 2 vols.

*Decisions and Orders* (cited: 1 N. L. R. B. 1), 1935 to date.

National Railroad Adjustment Board.

1st Decision. *Awards* 1- , 1936 to date.

2d Division. *Awards* 1- , 1936 to date.

3d Division. *Awards* 1- , 1936 to date.

Petroleum Labor Policy Board.

*Decisions*, 1934-1935.

Railroad Labor Board.

*Decisions* (cited: Decision No. 1820 (IV, R. L. B. 376) ), 1920-1925. 6 vols.

## Bureaus.

## Bureau of Budget.

*Digest of Principal Decisions of the U. S. Supreme Court, U. S. District Courts, Court of Claims, and Opinions of the Attorney General relating to Government Contracts, 1925.*

## Internal Revenue Bureau.

*Bulletin, 1922 to date.*

*Digest of Decisions . . . made by Commissioner of Internal Revenue, 1864-1904. 2 vols.*

*Digest of Treasury Decisions relating to Internal Revenue, 1916-1920.*

*Income Tax Rulings. Cumulative Bulletin, 1919-1921.*

*Digest of Court Decisions under the Harrison Narcotic Law, 1922.*

## Veterans' Bureau.

*Digest of Legal Opinions relating to the Veterans' Bureau, 1923-1926. 3 vols.*

## Veterans Affairs, Administration of.

*Decisions of the Administrator . . . in appealed pension and civil service retirement cases, 1930-32 to date. Continues Decisions of the Department of the Interior in appealed pension and bounty-land claims, 1887-1930. 22 vols.*

## Commissions.

## Federal Communications Commission.

*Decisions, Reports, and Orders (cited: 1 F. C. C. 3), 1934 to date.*

## Federal Power Commission.

*Opinions and Decisions (cited: 1 F. P. C. 3), 1931 to date.*

## Federal Radio Commission.

*Opinions of the General Counsel, 1928-1929. 1 vol.*

## Federal Trade Commission.

*Decisions (cited: 1 F. T. C. 13), 1915 to date.*

## Interstate Commerce Commission.

*Reports (cited: 40 I. C. C. 1), 1887 to date.*

*Motor Carrier Cases (cited: 1 M. C. C. 628) 1936 to date.*

*Valuation Reports, 1929 to date.*

## Securities and Exchange Commission.

*Decisions (cited: 1 S. E. C. 37), 1932 to date.*

## United States Maritime Commission.

*Decisions of the United States Shipping Board . . . Shipping Board Bureau, and U. S. Maritime Commission, 1919 to date.*

## Departments.

## Agriculture.

*Agriculture Decisions* . . . (including court decisions), 1942 to date.

*Decisions of Courts in Cases under the Federal Food and Drugs Act*, 1908-1933, compiled by Otis H. Gates (Department of Agriculture Secretary), 1934.

*Digest of Decisions under the Packers and Stockyards Act*, 1942. (Loose-leaf, processed.)

*Notices of Judgment under Caustic Poison Act*, 1931-1944.

*Notices of Judgment under Federal Food, Drug and Cosmetics Act*.

*Cosmetics*, 1940-

*Drugs and Devices*, 1940-

*Foods*, 1940-

*Index to Judgments*, 1940-

*Notices of Judgment Summarizing Judicial Review of Orders under Sec. 701 (f) of the Act*, 1944.

*Notices of Judgment under Food and Drugs Act*, (1908 to date.)

*Notices of Judgment under Regulations of Naval Stores Act*, 1929-1936.

*Laws, Decisions, and Opinions Applicable to the National Forests*, compiled by R. F. Feagons (Office of the Solicitor of the Department of Agriculture), 1916.

## Commerce and Labor.

*Opinions of the Solicitor* . . . *Dealing with Workmen's Compensation*, 1908-1915.

## Interior.

*Public Lands Decisions* (cited: 1 L. D. 291 (1881) ) 1881-1929. vols. 1-52. Continued by

*Decisions* (cited: 54 L. D. 15 (1932) ) 1930 to date. vols. 53-

*Decisions of the Department of the Interior in Appealed Pension and Bounty-Land Claims*, 1887-1930. 22 vols. Continued by Veterans' Affairs, which see.

## Justice.

Attorney General. *Opinions* (cited: 1 Op. Att. Gen. 1), 1789 to date. The Attorney General, as the chief law officer of the Federal Government, is required to give his advice and opinion upon questions of law to the President and the head of any executive department.



*Decrees and Judgments in Federal Anti-Trust Cases, 1890-1918.*

*Federal Anti-Trust Decisions, 1890-1931.* 12 vols.

*Federal Anti-Trust Laws, with Summary of Cases Instituted by the United States, and Lists of Cases Decided thereunder, 1938.*

#### Navy.

*Naval Digest, 1916 and 1921.*

*Compilation of Court-Martial Orders . . . 1916/27-1928/37.*

#### Post Office.

*Official Opinions of the Assistant Attorneys General for the Post Office Department, 1873-1914.* vols. 1-5. Continued by

*Official Opinions of the Solicitor of the Post Office Department, (cited: 8 Ops. Sol. P. O. D. 1) 1914 to date.* vols. 6- .

#### Treasury.

Comptroller of the Treasury. *Decisions:*

*1st Comptroller, 1880-1894.* 7 vols.

*2d Comptroller, 1817-1894.*

*Comptroller, 1894-1921.* 27 vols. Continued by Comptroller General. *Decisions.*

*Digest of Decisions of the United States Courts, board of General Appraisers, and the Treasury Department under the Customs Revenue Laws, 1918.* 2 vols.

*Digest of Customs and Related Laws and Decisions thereunder (to December 31, 1934),* by Thomas J. Doherty, 1936. 3 vols. This work should be used in conjunction with

*Compilation of Customs Laws and Digest of Decisions Rendered by the Courts and the Board of U. S. General Appraisers,* by Thomas J. Doherty, 1908.

*Synopsis of the Decisions of the Treasury Department on Construction of the tariff, navigation, and other laws, 1890.*

*Synopsis of the Decisions of the Treasury Department and Board of United States General Appraisers on the Construction of the Tariff, Immigration, and other laws, 1891-1897.*

*Treasury Decisions under Tariff and Internal Revenue Laws, etc., 1898-1899.*

*Treasury Decisions under Tariff and Navigation Laws, etc., 1900-1903.*

*Treasury Decisions under Customs and Other Laws*, 1904 to date.

*Treasury Decisions under the Customs, Internal Revenue, and Other Laws*. Issued Weekly.

War.

Judge-Advocate-General (Army). *Opinions*, 1917-1919. 3 vols.

*Digest of Opinions*, 1862-1941. Continued by *Bulletin*, 1942 to date.

Offices.

Copyright Office.

*Decisions of the U. S. Courts Involving Copyright*, 1909 to date. (Copyright Office. Library of Congress.) See also under Patent Office.

General Accounting Office.

*Decisions of the Comptroller General* (cited: 1 Comp. Gen. 1 (1921) ). July 1, 1921 to date. The function of the Comptroller General is "to insure due observance of all limitations and directions imposed by law in the matter of the expenditure of appropriated funds." His decisions are issued monthly as advance sheets and are later published in bound reports. Due to the fact that the decisions of the Comptroller General define the fiscal powers and duties of Government officials, he is called upon for opinions much oftener than the Attorney General. In addition to the published decisions of the Comptroller General, there are unpublished decisions. These are not generally circulated, the practice being to send copies affecting a particular agency to that agency. These opinions can be had by request to the Index Clerk in the office of the Comptroller General.

Office of Price Administration.

*Opinions and Decisions, Opinions of the Price Administrator and Decisions of Federal and State Courts on Price Control, Rent Control, Rationing, etc.*, 1944-

Patent Office.

*Decisions of the Commissioner of Patents and of the United States Courts in Patent, Trade-Mark and Copyright Cases*, 1869 to date.

Decisions, Orders, and Rulings of administrative bodies are also reported in the *Federal Register*.

Selected administrative decisions, orders, and rulings are also published in the *United States Law Week* and in the various loose-leaf services.

State.

Official.

The decisions, orders, and rulings of administrative commissions, boards, and officers whose powers are quasi-judicial are sometimes published officially by the states. The following reports are among the better known:

California. Railroad Commission. *Decisions*.

Illinois. Commerce Commission. *Opinions and Orders*.

Kentucky. Department of Revenue. *Special Reports*.

Massachusetts. Department of Corporations and Taxation. Board of Tax Appeals. *Advance Sheets*.

Michigan. Public Utilities Commission. *Orders and Opinions*.

Missouri. Public Service Commission. *Reports of Decisions*.

Nevada. Public Service Commission. *Opinions and Orders*.

New Hampshire. Public Service Commission. *Reports and Orders*.

New Jersey. State Tax Commission. *Report of Cases Decided*.

Oregon. Public Utilities Commissioner. *Opinions and Decisions*.

Pennsylvania. Public Utility Commission. *Decisions*.

Virginia. Department of Labor and Industry. *Opinions of Industrial Commission*.

Department of Workmen's Compensation. *Opinions of Industrial Commission*.

Wisconsin. Public Service Commission. *Opinions and Decisions*.

The method of publication is very irregular. Some sets are kept up to date by mimeographed or printed advance sheets.

The State of New York publishes *Department Reports of the State of New York, containing the Messages of the Governor and the Decisions, Opinions and Rulings of the State Officers, Departments, Boards and Commissions*, 1913 to date.

Unofficial.

Massachusetts. *Department Reports of the Commonwealth of Massachusetts*, containing Decrees, Rulings and Awards of the Execu-

tive, Legislative and Administrative Branches of Government affecting Business with Supreme Court Decisions in Full was published by the New England Bureau of Department Reports, Inc., from 1915 through 1920.

Ohio. *Department Reports of the State of Ohio*, containing the Decisions—Opinions—Rulings of the Public Utilities Commission, Attorney General, Dockets and Syllabi of the Supreme Court, New Incorporations, etc., 1915 to date, is published weekly by the Department Reports Publishing Co. of Columbus Ohio.

Pennsylvania. *Department Reports of Pennsylvania*; Opinions, Decisions, Rulings, News, Data from Departments and Branches of the Commonwealth Government, 1915 to date, is published weekly by the Department Reports Company of Harrisburg, Pa.

### C. LEGISLATION OF GREAT BRITAIN

#### 1. Constitution.

There is no written constitution.

#### 2. Treaties.

The treaties of Great Britain with other nations are published in the following series:

*Collection of Treaties and Conventions, Between Great Britain and Foreign Powers*, and of laws, decrees, orders in council, etc., concerning the same, so far as they relate to commerce, and navigation, slavery, extradition, nationality, copyright, postal matters, etc., compiled by Lewis Hertslet, and others. London, H. M. Stationery Off., 1827–1925. 31 vols.

*British and Foreign State Papers*, published by the Foreign Office. London, H. M. Stationery Off., 1812–1814 to date. (Hertslet's Commercial Treaties are incorporated 1922 to date.)

Treaties are also to be found in the various collections on special subjects such as those already mentioned above.

#### 3. Statutes.

Early English statutes were cited by the names of the places in which the Parliament was sitting when they were passed, e.g., Statute of Gloucester (1278). After Parliament was permanently located at Westminster the canon law practice of quoting the first two words of the text, e.g., *Quia Emptores*, was substituted for the earlier method of citation.

This method was in turn succeeded by the practice of designating the statutes as chapters of the statutes of the session of a particular regnal year, e.g., 29 Car. II, c. 3. Since the reign of Victoria it has been the custom to cite acts by their short titles and date, e.g., The Companies Act, 1900.

a. Current Statutes.

Slip Laws. Shortly after enactment, British statutes are issued individually in the form known as slip laws.

Recent legislation is also published periodically in parts of the *Law Reports*, *Law Journal*, *Law Times*, and *Solicitors' Journal*.

b. Session Laws.

Sessional or annual volumes of the statutes have been published continuously by the King's Printer, etc., from 1483 to date, with the exception of those for the period of the Commonwealth. These latter are to be found in *Acts and Ordinances of the Interregnum, 1642-1660*, edited by C. H. Firth and R. S. Rait. London, H. M. Stationery Off., 1911. 3 vols.

*Public General Statutes*, 1831 to date, have been published annually by the King's Printer. Unofficial editions from the same plates have been issued by the *Law Reports*, 1866 to date and by the *Law Journal*, 1866 to date.

c. Collected Editions.

*Statutes of the Realm*, 1225-1723. This folio edition is the most comprehensive and most accurate edition of all statutes, whether in force or repealed. It was printed from original and authentic manuscripts of the laws. Private Acts were printed in full for the period prior to 31 Henry VIII but were merely printed by title after that date. This is an official publication and may be cited as conclusive evidence of the law. It contains editorial notes.

(1) Early Editions—Statutes at Large.

There are various quarto editions of the early statutes such as the following:

Pulton's *Collection of Sundrie Statutes*, Magna Carta through Charles II. This edition includes editorial notes.

Scobell's *Collection of Acts and Ordinances of General Use made in the Parliament at Westminster*, 1640-1656. (In continuation of Pulton.)

Keble's *Statutes at Large*, Magna Carta to 7 George II.

Hawkins' *Statutes at Large*, Magna Carta to 30 George II.

Cay's *Statutes at Large*, Magna Carta to 13 George III.

Ruffhead's *Statutes at Large*, Magna Carta to 41 George III. 18 vols.

Runnington's *Statutes at Large*, Magna Carta to 41 George III. 14 vols.

Tomlins & Raithby's *Statutes at Large*, Magna Carta to 41 George III. 10 vols.

Tomlins, Raithby, Simons & Richards' *Statutes at Large*, continuing Tomlins & Raithby's edition to 32-33 Victoria (1869).

There are also handier octavo editions among which are the following:

Tomlins & Raithby's *Statutes at Large*, Magna Carta to 41 George III. 20 vols.

Pickering's *Statutes at Large*, Magna Carta to 46 George III.

Tomlins & Raithby's and Pickering's octavo editions were continued to 32-33 Victoria by the King's Printer.

(2) Modern Editions.

*The Statutes Revised*, 1236-1920. 2d ed. 4 vols. (1928-1929). This is an official edition and is therefore conclusive evidence of the law in force at the time of publication. It omits all Acts of a personal, private or local nature.

d. Annotated Editions.

Chitty's *Statutes of Practical Utility*. 6th ed. London, Sweet & Maxwell, 1911. 16 vols. The statutes from 1235 through 1910 which the editors deem of sufficient present importance to classify. The set is kept current by supplementary volumes.

*Practical Statutes*. Volumes of this set have been issued annually since 1849.

Butterworth's *Twentieth Century Statutes* 1900-1909. London, Butterworth & Co., 1910. 5 vols. Continued by *Yearly Statutes*, 1910 to date. vols. 6- .

*Everyday Statutes, Annotated*, London, Sweet & Maxwell, 1929. 4 vols. and Supp., 1929-1933 (1934). Contains those statutes in force on January 1, 1929, which are of interest to practicing lawyers. An Annual Noter-up brings it to 1938.

*The Complete Statutes of England*. London, Butterworth & Co., 1929-1931. 22 vols. This set, popularly referred to as "Halsbury's Statutes of England" consists of 20 volumes of text, a Consolidated Table of Statutes (vol. 21), and a General Index (vol. 22). The first edition was kept current by annual Continuation Volumes and a Cumulative Annual Supplement. A second edition to be in 27 volumes is in the process of being published and will be issued during the year 1948.

## 4. Statutory Rules and Orders.

Orders in Council are of two kinds: Prerogative and Statutory. The former are published in the appendix to the *Statutory Rules and Orders*.

## a. Current Material.

Individual rules and orders are printed separately in slip form as soon as they receive the approval of the proper administrative officers. They are later issued in annual volumes as part of the series entitled *Statutory Rules and Orders*, 1890 to date. Those of a personal, local, or temporary character are omitted from the annual volumes.

## b. Compilations.

*The Statutory Rules and Orders*, issued prior to 1890. 8 vols. (1890-1897).

*The Statutory Rules and Orders*, Revised to December, 1903, being the statutory rules and orders (other than those of a local, personal or temporary character) in force on December 31, 1903. 13 vols. Continued by Annual Volumes.

## c. Unofficial Publications.

Statutory Rules and Orders on special subjects are included in the loose-leaf services and other special subject materials.

The *Annual Statutes of Practical Utility*, the continuation of Chitty's *Statutes* includes Statutory Rules and Orders with annotations.

## 5. Rules of Court.

*The Annual Practice*, being a Collection of Statutes, Orders, and Rules relating to the General Practice, Procedure, and Jurisdiction of the Supreme Court, and on Appeal therefrom to the House of Lords. With Notes, Forms, etc. London, Sweet & Maxwell, 1883 to date. This annual volume also includes the Matrimonial Causes Rules, and Noncontentious Probate Rules, annotated, the Arbitration Act, annotated, and the law relating to Solicitors.

*Yearly Supreme Court Practice*. London, Butterworth & Co. 1936-1940. Supplements 1941, 1942, 1943, 1944. Issued annually commencing 1899.

*A B C Guide to the Practice of the Supreme Court*, by F. R. P. Stringer. To which is added *Crown Office Practice*, by W. E. Davis and D. Boland. London, Sweet & Maxwell. Published annually. According to the publishers, "This is an endeavour to tell the legal practitioner clearly and in a few words *how*, *when*, and *where* he may take such step in procedure as he may decide to take, and to define the mode, time, and place with precision.

*English and Empire Digest*. There is a special volume

devoted to Pleading, Practice and New Procedure (with Rules of the Supreme Court and Statutory Extracts bearing on Pleading and Practice), 1932. This is kept current by a section in the annual supplement.

*The Annual County Courts Practice, Annotated.* London, Sweet & Maxwell, 1889 to date. Recent editions follow *The Annual Practice* in form rather than the treatise of earlier issues. Practice is dealt with under the Rules and sections of the Acts. It contains a special chapter on Evidence.

*Yearly County Courts Practice.* London, Butterworth & Co., 1935-1940. 2 vols. Supplements 1941, 1943, 1944. Issued annually commencing 1899. Continued by

*The County Courts Practice.* London, 1945 to date. Issued annually commencing 1945.

*Stone's Justices' Manual*, being the Yearly Justices' Practice, with Table of Statutes, Table of Cases, Appendix of Forms, and Table of Punishments. London, Butterworth & Co., 1842-. Issued annually 1897 to date. 79th ed., 1947 in 2 vols. This manual contains a Part IV, Practice and Evidence, pp. 179-308.

## 6. Local Government Law.

*Local Government Law and Legislation*, containing the statutes, annotated and explained, etc., by William H. Dumsday. London, Hadden, Best & Co., 1899 to date. Published annually.

*Knight's Local Government Reports*, Part II (contains local government statutes, orders, etc.). London, Knight & Co., 1903 to date. Issued annually.

*Local Government*, comprising statutes, orders, circulars, memoranda, cases and departmental decisions affecting local authorities, edited by Alexander and Kenneth Macmorran. London, Butterworth & Co., 1908-1909 to date. Issued annually. Now popularly known as Skottowe's *Local Government Annual*.

*Local Government Law and Administration, England and Wales*, edited by Lord Macmillan. London, Butterworth & Co., 1934-1944. 14 vols. Supplemented by annual Continuation Volumes and an annual Cumulative Supplement.

### D. REPORTS OF JUDICIAL DECISIONS IN ENGLAND

#### 1. The Plea Rolls.

a. General. The earliest known plea rolls date from 1194. The plea roll of a term was a record of each case tried at the term. It contained much the same information for each cause as is found in the modern common-law record of an action. It contained the names of the parties and their counsel and the writ showing the kind of action. In place of the



modern written pleadings were the statements of the respective contentions of the parties with the issue as finally formulated for decision. If there was a verdict by the jury, that was included, as well as the judgment of the Court upon the verdict. There were separate plea rolls for each court and many of them have been made accessible either in the original or in translation.

b. Plea Rolls—*Curia Regis*. All of these rolls through 1220 have been made accessible in the following:

(1) *Rotuli Curiae Regis, 1194-1199* (Edited by Palgrave in 1835).

(2) *Three Rolls in King's Court, 1194-1195* (Edited by Maitland in 1891).

(3) *Curia Regis Roll, 1199-1230* (Published by the British Government between 1922 and 1938).

c. Plea Rolls—King's Bench. These rolls are also known as *Placita Coram Rege*, or '*Coram Rege Rolls*.' These rolls extend from 1 Edward I to 4 James II, and many of them have been made accessible.

(1) *Select Cases in the Court of King's Bench, Edward I* (Edited by G. O. Sayles, Selden Society Volumes 55, 57, 58).

(2) *Coram Rege Roll, 1297* (Edited by W. P. W. Phillimore, British Record Society 1897).

d. Plea Rolls—Common Pleas. These rolls are also known as *Placita de Banco* or merely as Plea Rolls. They extend from 1 Edward I to 21 Victoria. Extracts from many of the rolls of Edward II and Edward III have been given by the various editors of the Year Books of those reigns by the editors for the Selden Society and the Rolls Series.

e. Plea Rolls—Eyre Rolls. These are the rolls of the Justices Itinerant. Each roll is usually divided into Pleas of the Crown, Pleas of Juries and Assises, and Pleas of Quo Warranto. Many of them have been made accessible in printed form, the more important of which are,

(1) *Rolls of the Justices in Eyre for Yorkshire, 3 Henry III (1218-19)* (Edited for the Selden Society by D. M. Stenton, vol. 56).

(2) *Rolls of the Justices in Eyre for Lincolnshire (1218-19) and Worcestershire (1221)* (Edited for the Selden Society by D. M. Stenton, Vol. 53).

(3) *Rolls of the Justices in Eyre for Gloucestershire, Warwickshire, and Staffordshire, 1221-1222* (Edited for the Selden Society by D. M. Stenton, Vol. 59).

f. Plea Rolls—Selected Cases from Various Rolls.

(1) *Bracton's Note Book, 1218-1240* (Edited by Maitland, 1887).

(2) *Abbreviatio Placitorum, 1189-1327* (Edited by Record Commission, 1811).

2. The Year Books.<sup>9</sup>

The Year Books in Manuscript—These early reports cover the period roughly between 12 Edward I (1283-1284) and 38 Henry VIII (1547). It is not, however, until about 20 Edward I (1292) that we have the commencement of a fairly consecutive series of Year Books actually known to be in existence. There are some terms of Edward I later than the twentieth year missing; several terms of Richard II and Henry VI; and there are intermissions in the reigns of Henry VII and VIII. The point at which the Year Books stop and at which their place is taken by reports made by counsel who printed and published them in their own names is somewhat uncertain, and there is some measure of overlapping. It is not, however, until after the close of the reign of Henry VIII that we find a distinct change in the method of reporting and the form of the reports. Most of the manuscripts containing these reports are in the large public libraries in England though there are several in this country.

The Year Books in Print—In 1481 or 1482 some Year Books from the reign of Henry VI were put into print, and from that time until 1587 various printers, including Rastell, Pynson, and Tottel, published particular years and groups of years. In fact with the exception of the Year Books 1-19 Edward II first printed in 1678 they printed all of the Year Books to appear in print until critical editions were undertaken late in the nineteenth century. Between 1587 and 1640 the Year Books 1 Edward III to 27 Henry VIII were reprinted from former prints and made up into sets of ten small folio volumes known and incorrectly described as the "Quarto Edition." In 1678-1680 the ten volumes of Year Books comprising the "Quarto Edition" were reprinted and an eleventh volume was printed from manuscript containing the Year Books 1-19 Edward II and *Memoranda in Scaccario* for 2-29 Edward I. This reprint of 1678-1680—known as the "Vulgate" Edition—was exceedingly inferior to the earlier prints and its only favorable print is its corrupt print of the Year Books 1-19 Edward II. Until the latter part of the nineteenth century no more were printed. The text of these black letter prints—the name by which they are collectively known—is unbelievably bad. Maitland, who

<sup>9</sup> See generally, Bolland, *The Year Books* (1921); Bolland, *Manual of Year Book Studies* (1925).

knew them well, called them a "hopeless mass of corruption." Bolland, who continued Maitland's work and who was equally as familiar with them, seconds Maitland's statement, and explains the fact by pointing out that they were printed from manuscripts which were anything but accurate and which were liberally interspersed with abbreviations that could not be expanded by the ordinary editor or printer, and that they were execrably edited. The combination of corrupt manuscripts, carelessly ignorant transcribers, and incompetent editors (and of the 1678-1680 edition we are tempted to add, exceedingly shiftless printers), naturally made "a horrible mess of the work." And yet for all their corruption they are a veritable mine of information concerning English Legal history.

Between 1866 and 1879 the British Record Office produced in five volumes the *Year Books for 20-35 Edward I* (1292-1307), edited by Mr. A. J. Horwood in scholarly fashion, and between 1883 and 1911 the *Year Books 11-20 Edward III* (1337-1346), in fifteen volumes, the first volume by Mr. Horwood and Mr. Luke Owen Pike, the others by Mr. Pike. Mr. Pike's editorial work excelled that of Mr. Horwood in that he introduced the plan of giving extracts from the plea rolls to help clarify the text of the report. Between 1914 and 1939 the Ames Foundation published the *Year Books of 11-13 Richard II (1388-1390)*. The Selden Society between 1903 and 1938 published the *Year Books 1-10 Edward II (1307-1317)*, *10 Edward IV & 49 Henry VI (1470)*, and *1 Henry VI (1422)*, ably edited by Maitland, Harcourt, Bolland, Vinogradoff, Ehrlich, Mr. G. J. Turner, Miss M. D. Legge, Sir William Holdsworth, Mr. C. H. Williams, and Miss N. Neilson. It is still engaged in its plan to publish at least the remaining years of the reign of Edward II, and as many *Year Books* from the other reigns as possible.

The result is that there are at present in print the following *Year Books*:

Small Folio Edition (ca. 1481 to 1596).

For the most part each year is printed separately and the collection of groups of years did not come into use until late in the sixteenth century. For a full description of these early prints see Soule, *Year Book Bibliography*, 14 Harv. L. Rev. 557.

Quarto Edition (1596-1640).

- (1) *Year Books 1-10 Edward III* (1596).
- (2) *Year Books 17-39 Edward III* (1619).
- (3) *Year Books 40-50 Edward III* (1600).
- (4) *Year Books 1-50 Edward III Liber Assisarum* (1606).

- (5) Year Books 1-14 Henry IV, 1-9 Henry V (1605).
  - (6) Year Books 1-20 Henry VI (1609).
  - (7) Year Books 21-39 Henry VI (1601).
  - (8) Year Books 1-22 Edward IV (1640).
  - (9) Year Book 5 Edward IV, Long Quinto (1638).
  - (10) Year Books 1 Edward V, 1-2 Richard III 1-21 Henry VII, 17-27 Henry VIII (1597).
- Vulgate Edition (1678-1680).
- (1) Year Book 1-19 Edward II (Printed from MS).
  - (2-10) Reprint of Volumes 1-10 of the Quarto Edition, and vastly inferior to that edition.

#### Modern Critical Editions.

- (1) Year Books 20-35 Edward I (Rolls Series).
- (2) Year Books 1-10 Edward II (Selden Society).
- (3) Year Books 11-20 Edward III (Rolls Series).
- (4) Year Books 11-13 Richard II (Ames Foundation).
- (5) Year Book 10 Edward IV & 49 Henry VI (Selden Society).
- (6) Year Book 1 Henry VI (Selden Society).
- (7) Year Books 6-7 Edward II Eyre of Kent (Selden Society).
- (8) Year Book 11 Edward II (Selden Society).

The Year Books are to be sharply discriminated from the plea rolls. The plea rolls of a term contained the official record of each case tried. This record was intended as a permanent memorial of the litigation and its result. Although the roll includes much material of great value to lawyers and judges, as Bracton's *Note Book* amply demonstrates, yet it was not designed for the use or benefit of the legal profession but rather for the information and protection of officials, parties to the respective actions and their privies. The reports which make up the Year Books, on the other hand, are obviously of a character valuable principally to bench and bar. They set down the things occurring at the trial which the trial lawyer and the trial judge want to know. They exhibit the application of many rules of substantive law, but no one can read a volume of them without concluding that the chief interest of their authors was in procedure. Obviously what they wanted to preserve was a guide for proper pleading and trial practice.

The internal evidence makes it tolerably clear that the reporters were recording events occurring in their presence, —often they seem to be giving the very language of the pleaders and the justices. Of course, no one knows just

how, or under what conditions the reporters did their work. It is possible, however, to reconstruct a plausible picture of a mediaeval court scene. Mr. Bolland has allowed his legal-historical imagination to play thus:

"Serjeants are argning a case. There may be some half-dozen or more of them engaged in it. They are talking one against another. The Justices are intervening now and again in the debate. Repartees, sarcasms, aptly quoted proverbs, verses from the Bible and what not are being bandied about. . . . And somewhere in that Hall, perhaps in the apprentice's Crib, perhaps elsewhere, there is a little company of men, how few or how many I will not even attempt now to guess, who in some sort of shorthand of their own are noting down in the living language of the day the speeches and shifting arguments of the Serjeants and the matters of fact they spoke of, hot from the actual present life of the time, the jibes, the retorts, the quips, the criticisms by the Court, the judgments—whatever else that might interest them."<sup>10</sup>

Colorful incidents are not wanting. Passsley in argument refers to a badly drawn document as the work of no lawyer but of a man-at-arms, at which Chief Justice Bereford interjects: "Men-at-arms are clever at making a mess of work of this sort."<sup>11</sup> When counsel is arguing for his interpretation of a statute, Hengham curtly interrupts: "Do not gloss the statute; we understand it better than you do, for we made it." And when Grene is somewhat too emphatic in his assertions in opposition to suggestions from the court, Stonore puts him in his place thus: "I am amazed that Grene makes himself out to know everything in the world, and he is only a young man." The record does not always show an exercise of discrimination or delicacy on the part of the judges either in their choice of language or in their allusions. Frequently remarks were punctuated with profanity. In short, the reader is given the impression that the participants, be they judges or lawyers, were very human; and that, notwithstanding their calling, both they and the reporters had a sense of humor. The once commonly accepted notion that these reporters were paid officials of the court has been disproved. It is now rather generally thought that they were men who had some training in the law. Just how much they had is uncertain; but certainly they had not reached the rank of serjeant.

<sup>10</sup> Bolland, *The Year Books*, 3-4.

<sup>11</sup> Y. B. 5 Ed. II 140 (1311).

## 3. From the Year Books to "The Law Reports."

From the beginning of the sixteenth century there has been no lack of law reports in England, but not all reports have been of equal worth; indeed they vary in merit from excellent to worthless. "Published reports," as Mr. J. C. Fox explains, "require sifting to enable us to form a true estimate of their value. In considering a set of reports as a complete work, some of the following questions are suggested: What were the qualifications of the reporter? Under what circumstances were his reports published? Did he himself take notes of the cases or did he borrow and from whom? Were the reports published during his lifetime or edited by others after his death? Were they prepared by him with a view to publication? What opinions as to the authority of his reports have been delivered by judges and learned writers? What are the special features of the several editions?"<sup>12</sup> The considerations to be weighed in valuing a report, and particularly the attention to be paid to critical comment thereon by judges and text writers are more fully discussed by Wallace in the opening chapter of his book, "The Reporters." Wallace records his estimate of the worth of the English reporters through the reign of George II;<sup>13</sup> Fox has given his opinion of the merit of the reporters in the House of Lords, the Privy Council and Chancery from the point where Wallace ends to the time when "The Law Reports" begin in 1866,<sup>14</sup> and Mr. Van Vechten Veeder has set down his judgment of the value of all the reporters from 1292 to 1865.<sup>15</sup> A full list of English reporters may be found in Hicks,<sup>16</sup> pp. 432-483 and in numerous other places; hence, they will not be set down here. Suffice it to say that it seems to be generally agreed that of the earlier common law reports the following are of excellent authority: Dyer, Plowden, Coke, parts 1-11, Croke, Yelverton, Hobart, and Saunders; the following very good: Moore, Willes, Foster and Wilson; the following good: Anderson, Leonard, Davies, Rolle, O. Bridgeman, Sir T. Jones, Lord Raymond, Parker; the following from poor to worthless: Noy, Coke, parts 12, 13, Godbolt, Gouldsborough, Popham, Lane, Ley, Hutton, J. Bridgeman, Latch, Hetley, Ayleyn, Siderfin, Keble, Modern excepting volumes 2, 6, and

<sup>12</sup> J. C. Fox, *Handbook of English Law Reports*, 1913, 1-2.

<sup>13</sup> John William Wallace, *The Reporters* (3 ed., 1855).

<sup>14</sup> See note 8.

<sup>15</sup> *The English Reports, 1292-1865*, 15 Harv. L. Rev. 1, 109.

<sup>16</sup> Hicks, *Materials and Methods of Legal Research* 3d ed., 1942.

12, Comerbach, Salkeld, volume 3, Gilbert, Cases in Law and Equity, Fitzgibbon, W. Kelynge, Sayre. From Burrow on, most of the reports, except Lot, the eighth volume of Taunton, and Anstruther, have been of good repute. Most of the early Chancery reports are poor; not till Peere Williams (1695-1736) is there a clear and accurate reporter. Cox's reports (1783-1796) are the next worthy of much commendation; thereafter the chancery reports are generally satisfactory, ranging from fair to excellent.

#### 4. Reprints of English Reports.

##### a. English Reprints of Reports prior to 1865.

*English Reports—Full Reprint.* London, Stevens & Sons, 1900-1932. 176 vols. Reprints verbatim all the English reports, except the Year Books and certain collateral reports, prior to 1865.

*The Revised Reports.* London, Sweet and Maxwell, 1891-1920. 152 vols. Reprints all cases of common law and equity deemed to be of present value from 1785 to 1865.

##### b. American Reprints of Reports prior to 1865.

*English Admiralty Reports.* Boston, Little & Brown, 1853. 9 vols.

*English Common-Law Reports.* Philadelphia, Carey and Lea, 1822-1872. 118 vols. Cases in King's Bench and Queen's Bench from 1813 to 1865. Index, 3 vols.

*English Chancery Reports.* 69 vols. Cases decided between 1821 and 1865.

*English Exchequer Reports.* 47 vols. Cases decided between 1824 and 1866.

*English Reports in Law and Equity.* Boston, Little & Brown, 1851-1858. 40 vols. Cases decided between 1850 and 1857. Digest and Table of Cases, vol. 41.

##### c. Dublin Reprints of Reports prior to 1865.

There have been several Dublin reprints of portions of English reports prior to 1865.

##### d. American Reprint of Reports after 1865.

*Moak's English Reports.* Albany, Wm. Gould 1878-1889. 38 vols. English cases decided between 1872 and 1889, with notes. (Vols. 36-38 are Cook's Notes.)

#### 5. Collateral Reports.

Reports which were printed under the supervision of the courts during the period before 1865 are now referred to as "authorized reports." All other reports printed during that period are referred to as "collateral reports." They are listed in Hicks (3d ed., 1942, 442).

## 6. "The Law Reports."

Since 1865 "The Law Reports" have been published by the Incorporated Council of Law Reporting, a private institution, not under government control. The reporters are employed and paid by this corporation but are appointed with the approval of the judges; and their reports are not published until after approval or revision by the judges. From 1866 to 1875 the reports were issued in three series as follows:

1. Appellate, consisting of English and Irish Appeal Cases before the House of Lords, Scotch and Divorce Appeals before the House of Lords and Privy Council Appeal Cases.

2. Chancery, consisting of Chancery Appeal Cases, including Bankruptcy and Lunacy, and Equity Cases before the Master of the Rolls and before the Vice-Chancellors.

3. Common Law, consisting of Admiralty and Ecclesiastical Cases, Common Pleas Cases, Exchequer Cases, Queen's Bench Cases and Probate and Divorce Cases. With each section were reported Cases on Appeal from the court in question; thus, in Queen's Bench Cases were included cases in the Exchequer Chamber on Appeal from the Court of Queen's Bench.

These three series with their subdivisions made ten sets of reports. By the acts of 1873 and 1875 the Supreme Court of Judicature was established, consisting of the Court of Appeal and the High Court of Justice with its five subdivisions, namely, Queen's Bench Division, Common Pleas Division, Exchequer Division, Chancery Division, and Probate, Divorce and Admiralty Division. The ten sets were reduced in 1875 to six: (1) Appeal Cases, comprising all in the former Appellate Series; (2) Queen's Bench Division; (3) Common Pleas Division; (4) Exchequer Division; (5) Chancery Division, and (6) Probate Division. Each of these last five reported not only the cases of original jurisdiction in the particular division, but also the decisions of the Court of Appeal on appeals from that division. Since 1881, when the Common Pleas Division and the Exchequer Division were merged in the Queen's Bench Division, but four sets of reports have been published, namely, Appeal Cases, Queen's or King's Bench Division, Chancery Division and Probate Division.

Before 1865 the English reports are cited by the name of the reporter; from 1865 to 1890 they are cited as Law Reports followed by the number of the volume and the name of the court, usually abbreviated thus L. R. 5 Q. B. or L. R.



5 Q. B. D. The Appeal Cases in the House of Lords and Privy Council, however, are cited merely by volume number followed by Appeal Cases, abbreviated App. Cas. From 1891-1926 the reports are cited by giving the year of publication, the number of the volume for that year, and the abbreviation of the name of the court, thus: L. R. 1923, 2 K. B. and 1923 App. Cas. Since January 1, 1926, the methods of citation has been still further simplified: the year of the report and the initial letters of the court only are used, thus: [1926] 1 K. B.; [1926] A. C.

#### 7. Other Current Law Reports.

*The Law Journal Reports*, 1823 to date. London, E. B. Ince, 1822 to date. All courts.

*Law Times Reports*, 1859 to date. London, Law Times Office, 1844 to date. All courts.

*The Times Law Reports*, 1884 to date. London, George E. Wright, at The Times Office, 1885 to date. All courts.

*Weekly Notes*, 1866 to date. London, Incorporated Council of Law Reporting, 1866 to date. This publication contains advance reports which are later published in *The Law Reports*.

*All England Law Reports, Annotated*, 1936 to date. London, The Law Journal, 1936. This set which corresponds in many ways with the American *National Reporter System* includes cases decided in the House of Lords, the Privy Council, all divisions of the Supreme Court and Courts of Special Jurisdiction. It is issued as a weekly supplement to the *Law Journal Reports*, and since January 1948 it has incorporated the *Law Times Reports*.

#### 8. Reports of Selected Decisions of English Courts, General.

*Leading Cases in Various Branches of the Law*, by John W. Smith. 13th ed. London, Sweet & Maxwell, 1929. 2 vols. This annotated set has been spoken of as "perhaps the best known English textbook after Blackstone."

*English Ruling Cases*. Boston, Boston Book Co., 1894-1908. 27 vols. The editors have collected in 27 volumes those English cases prior to 1900 which they deem to be of especial significance; arranged them by topic; and annotated them with English and American notes.

*British Ruling Cases*. Rochester, Lawyers' Co-operative Publishing Co., 1911-1926. 16 vols. This series contains cases of general interest and importance from 1900 to 1926, selected from the English, Irish, Scotch, Canadian, and New Zealand reports.

9. Current Reports of Selected Decisions of English Courts (Special).

Admiralty.

*Aspinall's Maritime Law Cases*, New Series, 1870 to date. London, Horace Cox, 1870 to date.

Business Law.

*The Times Commerical Cases*, 1895 to date. London, "The Times," 1895 to date.

Criminal Law.

Cox's *Criminal Law Cases*, 1843 to date. London, J. Crockford, 1846 to date.

*Criminal Appeal Reports*, 1908 to date. London, Sweet & Maxwell, 1908 to date.

*Magisterial Cases*, 1896 to date. London, Butterworth & Co., 1896 to date.

Insurance.

*Lloyd's List Law Reports*, 1919 to date. London, Lloyd's, 1919 to date.

*Unemployment Insurance. Decisions of the Umpire respecting Claims to Benefit*, 1920 to date. London, H. M. Stat. Off., 1920 to date.

*Unemployment Insurance. Decisions Selected Given by the Umpire respecting Claims to Benefit*, 1911 to date. London, H. M. Stat. Off., 1911 to date.

Labor.

*Industrial Court Decisions*, 1919 to date.

Local Government.

Knight's *Local Government Reports*, 1903 to date. London, Knight & Co., 1903 to date.

Patents.

*Reports of Patent, Design, and Trade Mark Cases*, 1884 to date. London, Patent Office, 1884 to date.

Railways.

*Railway, Canal, and Road Traffic Cases*, 1855 to date. London, Sweet & Maxwell, 1874 to date.

Taxation.

*Annotated Tax Cases*, 1922 to date. London, Gee & Co., 1922 to date.

*De-Rating and Rating Appeals*, 1930 to date. London, "Rating & Insurance Tax," 1930 to date.

*Reports of Cases on Income Tax and Inhabited House Duties*, 1875 to date.

E. REPORTS OF JUDICIAL DECISIONS IN OTHER PARTS OF THE  
BRITISH EMPIRE

There are several good lists of reports of the Courts of Ireland, Northern Ireland, Eire, Scotland and the Dominions and Colonies.

Maxwell and Brown, *Complete List of British and Colonial Law Reports and Legal Periodicals*, 3d ed., 1937, pp. 51-104.

Eldon R. James, English Reference Materials in *How to Find The Law*, 3d ed. 1940. pp. 253-256.

Elizabeth Forgues, *List of British Law Reports*, revised by Grace W. Bacon in Hicks, *Materials and Methods of Legal Research*, 3d ed., 1942. pp. 453-483.

## II. BOOKS OF SECONDARY AUTHORITY

### A. AMERICAN LEGISLATIVE MATERIAL

#### 1. Constitutional Material.

##### a. Federal.

##### (1) Legislative History.

The legislative history of the Constitution may be found in the proceedings of the convention which formed it and in the record of the debates on its adoption. There were no official records of debates taken at the constitutional convention. Madison's notes are perhaps the most accurate account.

*The Records of the Federal Convention of 1787*, edited by Max Farrand. Rev. ed. New Haven, Yale Univ. Press, 1937. 4 vols. This is a day by day account of the Convention in which entries from the Journal and from Madison's, Yates', McHenry's and others' notes are correlated. It also includes supplementary records of proceedings, i. e., letters and papers, together with the various plans submitted, such as the Pinckney Plan, the Virginia Plan, etc.

*Documentary History of the Constitution of the United States of America, 1786-1870*. Washington, Govt. Print. Off., 1894-1905. Published under the authority of the Department of State. 5 vols. It includes the proceedings of the Annapolis Convention, of the Continental Congress, of the Constitutional Convention, and of the first Congress.

*Documents Illustrative of the Formation of the Union of the American States*. Compiled by Charles C. Tansill. Washington, Govt. Print. Off., 1927. (House Doc. 598, 69th Cong., 1st sess.) This book, compiled in the Library of Congress, supersedes the Department of State publication listed above. It contains the documentary background of the Constitution, commencing with the declarations and resolves of the First Continental Congress and

including the Declaration of Independence, Articles of Confederation, and the Ordinance of 1787. Therein set forth are the notes of William Pierce, Rufus King, William Paterson, Alexander Hamilton, James Madison, Robert Yates, and the papers of James McHenry.

*The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, edited by Jonathan Elliot. (2d ed., 1836.) (Reprinted in 1937 from original plates.) Philadelphia, J. B. Lippincott Co., 1937. 5 vols. The first four volumes include the journal of the Convention and the debates in the several state conventions on the adoption of the Constitution. The fifth, supplementary, volume, published in 1845 contains *Madison's Debates of the Federal Convention*.

*Drafting the Federal Constitution* by Arthur Taylor Prescott. Baton Rouge, La. State Univ. Press, 1941. The author attempts to classify the provisions of the Constitution on the basis of function and to rearrange Madison's record to show how each provision was consecutively evolved.

*The Growth of the Constitution* by William M. Meigs. Philadelphia, J. B. Lippincott Co., 1899. This is a valuable aid in tracing the origin and development of a clause from its original suggestion to its final form. Each clause is treated separately, and the table of contents lists each article, section, and clause. There is a general index.

*The Making of the Constitution* by Charles Warren. Boston, Little, Brown & Co., 1937. This book presents chronologically in narrative style the work of the Federal Convention, quoting at length from letters and newspaper articles written during the period. The index is to subject matter.

*The Federalist; a commentary on the Constitution of the United States*, by Alexander Hamilton, James Madison and John Jay, edited by Paul Leicester Ford. New York, H. Holt and Co., 1898.

*Contemporary Explanations*. Another source of background information on the Constitution is the writings of the founding fathers and their contemporaries.<sup>17</sup>

<sup>17</sup> Madison, James: *Journal of the Federal Convention*, edited E. H. Scott (1893). *Debates in the Federal Convention*, edited Gaillard Hunt

*Documents Antecedent Thereto. Where Found.* The Declaration of Independence, the Ordinance of 1787, and the Articles of Confederation can be found in most of the volumes listed in paragraph 1, and in the volumes listed in paragraph 2 which give the historical background for the Constitutional Convention.

(2) Construction and Interpretation by the Courts.

*Constitutional Construction and Interpretation* by Thomas H. Calvert, which originally appeared in *Federal Statutes Annotated* and was reprinted in the compilation *The Constitution and the Courts* (1924), is reprinted in the first of the U. S. C. A. volumes of the Constitution.

*The Constitution of the United States, Amended to January 1, 1938, Annotated.* This Library of Congress edition was issued as Sen. Doc. 232, 74th Cong., 2d sess. (1938). Each clause is set forth with annotations beneath it, which include historical notes on the formation of the Constitution, and a discussion, with U. S. Supreme Court case annotations, of the general principles of interpretation. In addition to the annotations, it lists Acts of Congress which have been held unconstitutional with the citations to the cases so holding. It has a comprehensive index.

*United States Code Annotated.* There are four volumes on the Constitution with annual, cumulative pocket parts which are kept up-to-date by quarterly cumulative pamphlets. They contain valuable historical notes, editorial comments, and notes of decisions.

*Federal Code Annotated.* The Constitution is annotated in Volume 1 which is kept up-to-date by

and James Brown Scott (1920). *Writings of*, edited Gaillard Hunt (1900-1910).

Yates, Robert: *The Secret Proceedings and Debates of the Convention*, copied by John Lansing, Jr. (1821).

Lansing, John, Jr.: *The Delegate from New York*, edited Joseph Reese Strayer (1939).

Franklin, Benjamin: *Writings of*, edited A. H. Smyth (1905-1907).

Washington, George: *Writings of*, edited Worthington Chauncey Ford (1889-1893).

Jefferson, Thomas: *Works*, edited Paul Leicester Ford (1904-1905).

King, Rufus: *Life and Correspondence of*, edited Charles Ray King (1894-1900).

Hamilton, Alexander: *Works of*, edited Henry Cabot Lodge (1904).

annual, cumulative pocket parts and by supplements issued throughout the year.

*Notes on the Constitution* by Thomas H. Calvert in *The Constitution and the Courts*, Northport, L. I., N. Y., Edw. Thompson Co., 1924, contains case annotations following the text of each clause.

There are also several useful treatises on constitutional law among which are:

*Commentaries on the Constitution of the United States* by Joseph Story. 5th ed. by Melville M. Bigelow. Boston, Little, Brown & Co., 1891. 2 vols.

*The Constitutional Law of the United States* by Westel W. Willoughby. 2d ed. New York, Baker, Voorhis & Co., 1929. 3 vols.

*A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States*, by Thomas M. Cooley. 8th ed. 1927. 2 vols.

*Selected Essays on Constitutional Law*, compiled and edited by a Committee of the Association of American Law Schools. Chicago, Foundation Press, 1938. 4 vols. This is a convenient reprint of many of the most important and informative articles from legal periodicals, etc.

*Discussions, etc.* There is much useful secondary material in the articles in legal periodicals. There are also some treatises with particular reference to the experience of particular states, such as *State Constitution Making* by Wallace M. McClure. Nashville, 1916.

## 2. Treaty Materials.

### a. Legislative History.

*Papers Relating to the Foreign Relations of the United States*, 1861 to date. Washington, Govt. Print. Off., 1862 to date. This series which has been published by the Department of State since 1861 is popularly known as *Foreign Relations*. It includes the diplomatic correspondence of the United States.

*Diplomatic Correspondence of the United States. Inter-American Affairs, 1831-1860*, selected and arranged by William R. Manning. Washington, Carnegie Endowment for International Peace, 1931-1939. vols. 1-12.

*Diplomatic Correspondence of the United States concerning the Independence of the Latin American Nations*, selected and arranged by William R. Manning. New York, Oxford Univ. Press, 1925. 3 vols.

*Journals of the Executive Proceedings of the Senate of the United States.* These cover the proceedings of the executive sessions of the Senate, including Senate action on treaties. They contain some reports of the Committee on Foreign Relations but do not include any speeches or debates. When the executive session holds open meetings, the debates are reported in the Congressional Record. The Journals are confidential in nature and are not released or printed until several years after the sessions. To date printings have been authorized:

- 1st to 19th Congress 1789-1829 vols. 1-3 (1828);
- 20th to 40th Congress 1829-1869 vols. 4-16 (1887);
- 41st to 51st Congress 1869-1891 vols. 17-27 (1901);
- 52nd to 58th Congress 1891-1905 vols. 28-34 (1909) (vols. 33 and 34, since 1901, have not been released);
- 58th through 71st Congress 1905-1931 not yet printed.

*Senate Executive Reports* contain reports by the Committee on Foreign Relations regarding treaties. They are not circulated in the same manner as other congressional documents and reports and are available for public use only when released by order of the Senate.

*Reports of Committee on Foreign Relations. United States Senate, 1789-1901* (1901), 8 vols. (S. Doc. 231, 56th Cong. 2d sess.). These volumes cover reports of the Senate Committees on Foreign Relations from the 1st Congress, 1st session, to the 56th Congress 2d session. Each volume is indexed.

*Senate Executive Documents* contain treaties and messages from the President and the Secretary of State relating to treaties. They are available for public use only when released by the Senate.

*A Compilation of the Messages and Papers of the Presidents, 1789-1897*, 10 volumes, prepared by James D. Richardson (H. R. Misc. Doc. 210, 53d Cong., 2d sess. 1896-1899). Private editions purport to bring the material down to 1927. These editions, however, contain no official material of a later origin than 1899.

b. Construction and Interpretation.

The judicial construction and interpretation of treaty provisions will be found in Federal and State reports. The Attorney General of the United States has also been asked from time to time to interpret provisions of treaties.

Much useful material may be found in such secondary sources as the following:

*International Law Chiefly as Interpreted and Applied by the United States*, by Charles Cheney Hyde. Boston, Little, Brown & Co., 1945. 3 vols.

*Making of treaties and international agreements, and work of the Treaty Division of Department of State*, address by William V. Whittington, Treaty Division, Department of State, before Conference of Teachers of International Law, Washington, D. C., Apr. 29, 1938. 1938. 33 p. (State Dept.)

*History and Digest of the International Arbitration to Which the United States Has Been a Party*, together with appendices containing the treaties relating to such arbitration, and historical and legal notes, etc., by John Bassett Moore. Washington, Govt. Print. Off., 1906. 8 vols.

*International Adjudications, Ancient and Modern, History and Documents* together with Mediatorial Reports, Advisory Opinions, etc. Edited by John Bassett Moore. (Modern Series.) New York, Oxford Univ. Press, 1929. 4 vols.

*A Digest of International Law*, by John Bassett Moore. Washington, Govt. Print. Off., 1906, 8 vols.

*A Digest of International Law*, by Green H. Hackworth. Washington, Govt. Print. Off., 1940-1944. 8 vols.

*Digest of the Published Opinions of Attorneys General and of the Leading Decisions of the Federal Courts with reference to International Law, Treaties, etc.*, by John L. Cadwalader. Rev. ed. Washington, Govt. Print. Off., 1877.

*Digest of the Opinions of the Attorneys General, 1789-1876*, by Christopher C. Andrews.

*Digest of the Opinions of the Attorneys General, 1789/1881-1906/1921* (vols. 1/16-26/32) in 3 vols.

*Treaties with Indian Tribes. Handbook of Federal Indian Law*, by Felix Cohen. Washington, Govt. Print. Off., 1942. Contains valuable references to Indian treaties, secondary material, and an excellent bibliography.

### 3. Statutory Materials.

#### a. Federal.

##### (1) Legislative History—Congressional Intent.

*Committee Reports—Senate and House of Representatives* (cited: S. or H. R. Rept. 1011, 78th Cong., 2d sess. (1944)). When they can be obtained in printed form, these reports are a most important and authoritative source of information concerning the intent of the legislature in passing



the law. Very often they contain copies of briefs and other papers not otherwise accessible.

*Committee Hearings—Senate and House of Representatives* (cited: *Hearings before Committee on Military Affairs on S. or H. R. 4000, 78th Cong., 2d sess. (1944)*). The printed hearings are almost as informative as the committee reports, although not equally authoritative. In them may be found such material as communications to the committee from administrative officers, briefs submitted by interested parties, and other data useful in reconstructing the problem which Congress intended to solve by the proposed enactment.

Records of Debates.

*Annals of Congress (1789–1824)* (cited: 38 *Annals of Cong. (1821)* 10). This set of forty-two volumes was published in 1834. The text consists of an abstract of the proceedings in each Congress followed by the public laws and some executive reports of the same period.

*Register of Debates (1824–37)* (cited: 10 *Reg. Deb. (1833)* 2, or 10 *Cong. Deb. (1833)* 2). Each of the fourteen volumes of this set was published shortly after the session which it reported. In addition to an abstract of the proceedings in each Congress the set contains the text of the public laws passed, some of the reports submitted by departmental heads and committees, and messages sent by the President.

*Congressional Globe (1833–1873)* (cited: *Cong. Globe, 36th Cong., 1st sess. (1860)*, 225). This set resembled the *Register of Debates* in its early volumes, five of which overlapped the earlier set. Gradually its form was changed from an abstract of the debates to a more adequate report similar to that of the modern *Congressional Record*.

*Congressional Record (1873 to date)*. The *Congressional Record* appears in four forms, the daily, the greenback, the sheepskin, and the final editions. Matter for which "leave to print" has been obtained is printed in the appendix.

The daily edition (cited: 90 *Cong. Rec., June 19, 1944, at 6219*) is not a complete verbatim report of the proceedings, since it

omits matter "withheld for revision" but frequently includes matter later expunged. It differs in pagination and volume number from the final, bound edition.

The greenback and the sheepskin editions (cited: in the same manner as the daily edition) are little more than a gathering of the daily edition. They cover approximately two weeks' proceedings and often vary because of corrections.

The permanent, bound edition. This differs in pagination and text from the daily edition, since it contains matter "withheld for revision," omits matter ordered expunged, and prints in its proper place as appendix volumes matter for which "leave to print" has been obtained.

The historical notes and editorial comments in the *United States Code Annotated* and the *Federal Code Annotated* furnish an excellent lead to pertinent material.

*Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose.* 2 vols. (Bound for examination by the Committee of the House of Representatives of the 42d Congress on the Revision of the Laws). Washington, Govt. Print. Off., 1872. This is of great help in construing the *Revised Statutes*.

Much useful material is to be found in the *U. S. Code Congressional Service* which contains in "Congressional Comments" important Senate and House reports as well as a brief index-digest of bills introduced.

The various loose-leaf services also contain much of the legislative history of matters within their special fields.

*Notes on the Revised Statutes of the United States and the Subsequent Legislation of Congress*, by John M. Gould and George F. Tucker. Boston, Little, Brown & Co., 1889-1904. 3 vols. This work is useful in dealing with the *Revised Statutes*.

## (2) Construction and Interpretation.

In addition to the rules of construction and interpretation as found or deduced from the decisions of the courts and the opinions of the Attorney General, there are useful treatises on the subject. The most recent are the following:

*The Construction of Statutes*, etc., by Earl T. Crawford. St. Louis, Thomas Law Book Co., 1940.

*Statutes and Statutory Construction*, by J. G. Sutherland. 3d ed., by Frank E. Horack, Jr. Chicago, Callaghan & Co., 1943.

There is also a useful article entitled *Statutes and Statutory Construction* by Charles C. Moore printed in Volume 1 of the *Federal Statutes Annotated*.

b. State.

(1) Material useful in the construction of statutes.

Committee Reports. Full texts of committee reports are to be found in the Legislative Journals for the following:

(a) Senate Committees and Joint Conference Committees in: Arizona, California, Florida, Minnesota, New York, North Dakota, and Texas.

(b) House Committees and Joint Conference Committees in: Arizona, California, New Hampshire, New York, Oklahoma, Texas, West Virginia, and Wyoming.

Condensed reports are to be found in the Legislative Journals of Idaho and Illinois.

Committee reports are sometimes available in official sets of Legislative Documents.

Committee Hearings. Hearings are occasionally published as a part of the official Legislative Documents.

Opinions of the Attorney General. Opinions are sometimes published in conjunction with an administrative report, and sometimes separately. In New York opinions of the attorney general are also published in the *Department Reports*.

Record of Debates. With the exception of the *Pennsylvania Legislative Journal*, 1911 to date, there is no state equivalent of the *Congressional Record*. The nearest to an equivalent is the *Maine Legislative Record*, 1897 to date, which contains a condensed record.

Historical and editorial notes, when they are available, furnish a key to much secondary material.

(2) Material recording the legislative history of bills.

Legislative Journals. These vary greatly in detail and usefulness. As a general rule they are of little assistance.

Bulletins, Indexes, Calendars, etc. Official publications recording the legislative history of bills are issued in the following states:

Arizona	Kansas	Ohio
Arkansas	Maryland	Oregon
California	Massachusetts	Pennsylvania
Colorado	Michigan	Virginia
Connecticut	Mississippi	Washington
Illinois	Missouri	West Virginia
Indiana	Nebraska	Wisconsin
Iowa	New Jersey	Wyoming

These publications list bills in numerical order and in a great many cases digest the bills listed.

Unofficial publications serving the same purpose are issued in Connecticut, Kansas, Kentucky, Massachusetts, New Jersey, New York, North Carolina, Ohio, and Pennsylvania.

*C. C. H. Legislative Reporting Service.* This loose-leaf service reports the introduction and progress of legislation.

#### 4. Rules and Regulations of Administrative Commissions, Boards, and Officers.

##### a. Federal.

The background of current developments in administrative law may be studied in the following:

*Administrative Procedures in Government Agencies: Report of the Committee on Administrative Procedure Appointed by the Attorney-General [Feb. 24, 1939], at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein.* Washington, Govt. Print. Off., 1941. (Sen. Doc. No. 8, 77th Cong., 1st sess.)

*Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Embodying the Results of the Investigations Made by the Staff of Said Committee Relative to the Administrative Practices and Procedures of Several Agencies of the Government.* Washington, Govt. Print. Off., 1940. 13 pts. (Sen. Doc. No. 186, 76th Cong., 3d sess.) A second series in 14 pts. appeared as Sen. Doc. No. 10, 77th Cong., 1st sess.

The Report listed above provided two bills, one written by the majority and one by the minority. The

bill submitted by the minority was approved by the American Bar Association and it furnished the substance of the new Administrative Procedure Act of 1946.

*Administrative Procedure Act: Legislative History, 79th Congress, 1944-46.* Washington, Govt. Print. Off., 1946. (Sen. Doc. No. 248, 79th Cong., 2d sess., also printed in slip laws as Pub. Law 404, c. 324.

*The Federal Administrative Procedure Act and the Administrative Agencies; Proceedings of an Institute Conducted by the New York University School of Law on February 1-8, 1947, edited by George Warren with an introduction by Dean Arthur T. Vanderbilt.* (New York University School of Law: Institute Proceedings, Volume VII), New York, New York University School of Law, 1947.

*Administrative Procedure Act, with Explanation* (C.C.H. Federal Administrative Procedure Edition). New York, Commerce Clearing House, Inc., 1946.

*Administrative Procedure; A Handbook of Law and Procedure before Federal Agencies* (C.C.H. Current Law Handybook Edition), 2d ed. New York, Commerce Clearing House, Inc., 1946.

*C. C. H. Federal Administrative Procedure; Practice and Procedure Before Federal Agencies.* 2d ed. Chicago, Commerce Clearing House, Inc., 1946. 2 vols. loose-leaf. This service contains, in addition to the annotated Act, a Treatise on Federal Law and Practice, and specific sections dealing with each of the Federal Administrative Agencies setting forth the publications, history, organization, statutes, regulations, rules of practice and procedure, etc., and a section on the Federal Tort Claims Act.

There is also Pike and Fischer's *Administrative Law Service*. Albany, Matthew Bender & Co., 1945. 5 vols., loose-leaf. The matter in this service must be brought to date to conform to the Administrative Procedure Act. It includes a Guide or treatise, and reprints of selected articles and reports.

b. State.

Many of the loose-leaf services on particular fields of administrative law contain much useful material concerning state administrative rules and regulations.

c. General.

There are many articles in legal periodicals dealing with special topics in administrative law. There is also a compilation of many of these articles in Book 4 of

*Select Essays on Constitutional Law*, published by the Association of American Law Schools.

5. Rules of Court.

a. Federal.

(1) Legislative history.

*Rules of Civil Procedure for the District Courts of the United States, Documentary History, 1934-1938.* A compilation of documents bound in 1 volume by the Library of Congress.

(2) Construction and Interpretation.

*Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States, effective Sept. 16, 1938; annotated with the notes of the Advisory Committee.* Washington, Govt. Print. Off., 1938. The Notes were also published separately as H. Doc. 588, 75th Cong., 3d sess. The Proceedings for the Institute at Cleveland, July 21-23, 1938 were appended.

*Federal Rules of Civil Procedure. Proceedings of the Institute at Washington, D. C., October 6, 7, 8, 1938 and of the Symposium at New York City, October 17, 18, 19, 1938,* edited by E. H. Hammond (for the American Bar Association). Chicago, American Bar Association, 1939.

*Federal Rules of Civil Procedure, with Approved Amendments, Advisory Committee Notes, and Monographs.* 1947 Revised Edition. St. Paul, West Publishing Co., 1947.

*Federal Rules Decisions; Opinions, Decisions and Rulings Involving the Federal Rules of Civil Procedure.* St. Paul, West Publishing Co., 1941 to date. In addition to reporting cases involving the rules, this set includes a list of Federal Judges, Tables of Cases Reported, Cases Arranged by Circuit, a Table of Statutes Construed, Federal Rules of Civil Procedure Construed, and Words and Phrases; and the Text of the Rules, Articles, Bibliography, Index to Bar Association and Law Review Articles; and a Key Number Digest. Beginning with Volume 5 it also includes the Federal Rules of Criminal Procedure and matter concerning them as well. Monthly advance sheets are issued.

*Federal Rules Service, The Weekly Guide to the New Federal Practice.* Chicago, Callaghan & Co., 1939 to date. 9 vols. plus the Current (loose-

leaf) Volume and index. This set contains Cases, Commentary, Law Review Articles, Local Court Rules, and State Citator.

*Moore's Federal Rules and Official Forms, as Amended, with Comments on the Amendments (Fully Indexed)*, Albany, Matthew Bender, 1947 (Pamphlet).

Annotations will be found in the *United States Code Annotated*, *Federal Code Annotated*, Mason's *Code Annotated*, and *Federal Digest*.

*Jurisdiction and Procedure of the Courts of the United States in Civil Actions under the Constitution, United States Code, and the New Federal Rules of Civil Procedure*, by Gustavus Ohlinger, with Loveland's Revised Forms. Cincinnati, W. H. Anderson Co., 1939-1948 (Pocket Parts).

*Cyclopedia of Federal Procedure, Civil and Criminal*, Edited by Palmer D. Edmunds. 2d edition. Chicago, Callaghan & Co., 1943-44. 14 vols. (Pocket Parts).

*Cyclopedia of Federal Procedure Forms, Civil and Criminal*, by Palmer D. Edmunds. Chicago, Callaghan & Co., 1939. 4 vols. (Pocket Parts).

*Federal Rules of Criminal Procedure, with Approved Amendments, Monographs, Advisory Committee Notes, Bibliographical Tables*. 1947 Revised edition. St. Paul, West Publishing Co., 1947.

*Federal Rules of Criminal Procedure, with Notes Prepared Under the Direction of the Advisory Committee Appointed by the United States Supreme Court, and Proceedings of the Institute Conducted by the New York University School of Law . . . February 15 and 16, 1946*. Edited by Hon. Alexander Holtzoff . . . with an introduction by Hon. Tom Clark. (New York University School of Law: Institute Proceedings, Volume VI), New York, New York University School of Law, 1946.

*Federal Rules of Criminal Procedure*, by Wm. Scott Stewart. Chicago, The Flood Co., 1946. This book is by an opponent of the Rules. He contends: "When these new Federal Criminal Rules go into effect, the Constitution will mean nothing."

*Federal Jurisdiction and Procedure, with Statutes, New Rules and Forms*, by Charles C. Montgomery. 4th ed. San Francisco, Bancroft-Whitney, 1942 (Pocket Part). Covers all Federal Rules.

#### b. State.

While some material may be found in local practice books, by far the best source of secondary material is

that found in the loose-leaf services covering the various fields of administrative control.

Articles in legal periodicals should not be neglected.

6. Rules of Procedure of Federal and State Administrative Bodies.

*C. C. H. Federal Administrative Procedure*, 2d ed., mentioned above contains a Treatise which has useful material on "Adjudication" and "Judicial Review and Enforcement."

Similar material may be found in the services which cover the various special fields of administrative control.

Pike and Fischer's *Administrative Law Service* also has much useful secondary material.

*Administrative Tribunals and the Rules of Evidence: A Study in Jurisprudence and Administrative Law*, by Hon. Harold M. Stephens. Cambridge, Harvard University Press, 1933. (Harvard Studies in Administrative Law, Volume III.) This is an interesting study of this phase of administrative law.

"Admission to Practice: Present Regulation by Federal Agencies," by John W. Cragun, in 34 *A. B. A. Journal* III (February, 1948) contains along with textual discussion a useful chart setting forth "Control Over Practice Before Administrative Agencies." At the time of this writing Congress is considering proposals to standardize the requirements for admission to practice.

Much useful material on this subject may be found in articles in the various legal periodicals.

7. Municipal Material.

*On Municipal Corporations*, by Eugene McQuillin. 2d ed. Revised. Chicago, Callaghan & Co., 1937-1945. 7 vols. and cumulative supp. 1947.

*On Municipal Corporations*, by John F. Dillon. 5th ed. Boston, Little, Brown & Co., 1911-1921. 5 vols.

*On Municipal Corporations*, by Charles B. Elliott. 3d ed. Chicago, Callaghan & Co., 1925.

*Federal Limitations Upon Municipal Ordinance Making Power*, by Harvey Walker. Columbus, The Ohio State University Press, 1929.

*Digest of City Charters Together with Other Statutory and Constitutional Provisions Relating to Cities*, compiled by Augustus R. Hatton for the Chicago Charter Convention, 1906. Chicago, Chicago Charter Convention, 1906.

*Loose-leaf Digest of City Manager Charters; Containing a Digest of 167 City Manager Charters Now in Operation in American Cities*, by R. T. Crane. New York, The National Municipal League, 1923.



*The Law and Practice of Municipal Home Rule*, by Howard Lee McBain. New York, Columbia University Press, 1916.

*Law and Practice of Municipal Home Rule, 1916-1930*, by Joseph D. McGoldrick. New York, Columbia University Press, 1933.

There are several other standard texts on subjects falling within the field of municipal control which are too numerous to list here.

## B. AMERICAN JUDICIAL MATERIAL

### 1. Digests.

The millions of cases reported in those jurisdictions which are under the system of Anglo-American Common Law are indexed for purposes of research in books called "digests." Digests are composed of an alphabetically arranged system of main headings under the various divisions, subdivisions, and sections of which are entered summaries of the points of law decided in the cases.

#### a. American Digests (General).

Until about the middle of the nineteenth century there were no worthwhile general digests of American case law. Dane's *Abridgement*, published in 1823-1824, was a hybrid of digest and commentary which included for the most part, only the law of the Federal Courts and of Massachusetts. In 1848 the publication of the *United States Digest*, digesting decisions from 1847 to 1869, was begun and carried on until 1871. In 1874-1876 Abbott's *United States Digest* of cases from 1790 to 1869 was published in fourteen volumes. This work was followed by the *United States Digest, New Series*, which was published annually until 1887 when it was merged with the *American Digest*. The *Complete Digest* which was begun in 1887 was combined with the *American Digest* in 1890; but the *General Digest* which was first published in 1890 was not discontinued until 1907. Since that date the *American Digest System* has been without competition.

The *American Digest System* is built on a scheme of classification in which all propositions of law are divided into seven Categories: Persons, Property, Contracts, Torts, Crimes, Remedies, and Government. These categories are divided into thirty-four Classifications, which, in their turn, are subdivided into four hundred and fourteen Topics. The topics are arranged alphabetically in each of the seven units of the System. Each topic is prefaced by a Scope Note which shows what is

included and excluded from cases included under it. Each topic is also provided with an Analysis showing its main divisions, subdivisions, sections, and subsections; and Cross References pointing out other topics under which specific phases of the material are treated. It is the purpose of this digest to give to every proposition of law a specific topic and section or key-number under which cases dealing with it will always be digested. When the topic and key-number covering a proposition is found, therefore, it is possible to locate all cases which the editors believe to be in point. It now consists of:

- (1) The *Century Digest* of decisions of appellate courts from 1658 to 1896 in 50 volumes;
- (2) The *First Decennial*, 1896-1906 in 25 volumes;
- (3) The *Second Decennial*, 1907-1916 in 24 volumes;
- (4) The *Third Decennial*, 1916-1926 in 29 volumes;
- (5) The *Fourth Decennial*, 1926-1936 in 34 volumes;
- (6) The *Fifth Decennial*, 1936-1946 (now on press).
- (7) The General Digest, 2d Series, 1946 to date (a monthly digest cumulated semi-annually).

It has been said that the entire body of American Case Law is digested in the American Digest System which surpasses in thoroughness and accuracy all its predecessors. In 1937 it contained approximately 6,500,000 digest paragraphs representing 1,625,000 cases; and it is, therefore, fair to assume that every case decided by a court of last resort in this country is somewhere included. Since it consists of a collection of headnotes or syllabi of the cases arranged according to a fixed classification, it can be complete and accurate only to the limit of completeness and accuracy which the headnotes or syllabi themselves attain. It is, however, common knowledge in the legal profession that headnotes vary in completeness and accuracy with the skill, ability, and disposition of their authors, whether the latter be judges, court reporters, or members of a publisher's editorial staff. Consequently, while this digest may be an index to all American cases, it has not only the unavoidable deficiencies of every index but also the imperfections consequent from recourse to headnotes as statements of the essentials of a decision.

The material in the *General Digest, 2d Series*, pamphlet supplements is kept up-to-date by the index-digest in the various *Reporters* and their advance sheets which have been subsequently issued.

The *American Digest System* and the *National Reporter System* are popularly known as the "key-number" system. The term "key-number" comes from the small picture of a key which is used in place of the usual sign "§" to designate sections.

b. American Digests (Special).

(1) Federal—Supreme Court.

*Digest of the United States Supreme Court Reports.* Rochester, Lawyers' Cooperative Pub. Co., 1923-45. 11 vols. The set consists of the following: (1) Replacement Volume 1 (1943), Tables and the beginning of the text; (2) Volumes 2-8, the remainder of the text; (3) Volume 9, The Tables of Cases; (4) Volume 10, The Word Index and (5) Volume 11, Court Rules. The set is kept up to date by annual cumulative pocket supplements. The 1943 supplements are considered permanent and are bound in those copies of volumes 2-10 which have been sold recently. Volume 1 being a replacement volume incorporates the 1943 material in the volume proper. Volume 11 (Court Rules) will be replaced in May or June, 1948.

*United States Supreme Court Digest, 1754 to date: A Complete and Modern Key-Number Digest from Earliest Times of Every Decision of the Supreme Court of the United States.* St. Paul, West Pub. Co., 1943-1946. 16 vols. The set consists of the following: (1) Volume 1, Descriptive Word Index; (2) Volumes 2-13, text of digest; (3) Volume 14, Table of Cases; (4) Volume 15, Defendant-Plaintiff Table of Cases and Words and Phrases and Volume 16, Rules.

*Encyclopedia of the United States Supreme Court Reports.* Charlottesville, The Mickie Co., 1908-1911. 11 vols. The original set of eleven volumes covered the period of 1908-1911. A six volume Permanent Supplement brings the material down to 1935. Digests of recent case material are published in pocket parts. (1939, latest published.)

(2) Federal—Inferior Courts.

*Federal Cases Digest.* St. Paul, West Pub. Co., 1898. 1 vol. The editors digest in this volume cases from the United States Circuit and District Courts from 1789-1880.

*The Federal Digest, 1754 to date*; covering Supreme Court of the United States, United States Court of Appeals for the District of Columbia, United States Court of Customs and Patent Appeals, District Courts of the United States, United States Court of Claims, as well as all other Federal Courts from the earliest times to date. St. Paul, West Pub. Co., 1942-1945. 72 vols. The set consists of the following: (1) Volume 1 (pt. 1-2) Descriptive Word Index; (2) Volumes 2-65, text of digest; (3) Volumes 66-68, Table of Cases; (4) Volumes 69-70, Defendant-Plaintiff Table of Cases; (5) Volumes 71-72, Words and Phrases; and Volume 72 Court Rules Construed and Popular Name Table. In addition there is in Volume 52 under Patents Sec. 328 a list of "Decisions on the Validity, Construction, and Infringement of Particular Patents," and in Volume 61 following Sec. 101 of Trade Marks a list of "Trade-Marks and Trade-Names Adjudicated." The set is kept up to date by pocket parts and cumulative pamphlet supplements.

(3) State.

There is at least one digest of the reports of each state. Such digests, depending on local caprice, are referred to by the name of the state—e.g. the *California Digest*—or by the name of the compiler—e.g. *Dunnell's Digest* (Minnesota). They vary in form and content. Generally, they conform to the *American Digest System* classification. A few, however, are encyclopedic.

(4) Sectional.

There are digests for each sectional unit of the *National Reporter System*; i.e., *Atlantic*, *North-eastern*, *Northwestern*, *Pacific*, *Southeastern*, *Southern*, and *Southwestern*.

c. Selected Cases (General).

*A Digest of the Decisions . . . Contained in . . . the American Decisions and American Reports*, by Stewart Rapalje. San Francisco, Bancroft-Whitney, 1910. 3 vols. This set digests the cases in "American Decisions," volumes 1-100; and "American Reports," volumes 1-60, 1760-1888. Its classification is identical with that of the *American Digest System* and scope notes from that system have been included with the permission of the publishers.

*A Digest of "American State Reports,"* by Edmund S. Green. San Francisco, Bancroft-Whitney, 1904—

1912. 5 vols. The first three volumes cover "American State Reports," volumes 1-96; two supplementary volumes cover 97-120 and 121-140.

*American and English Annotated Cases Digest.* Northport, N. Y., Edward Thompson Co., 1912-1921. 2 vols. Volume 1 covers "American and English Annotated Cases," volumes 1-20, 1906-1911. Volume 2 covers "American Annotated Cases," volumes 1912 A-1918 E.

*Lawyers' Reports Annotated Complete Digest.* Rochester, Lawyers' Co-operative Pub. Co., 1921-24. 10 vols. Volume 9 is a Table of Cases, and Volume 10 a Word Index.

*American Law Reports Cumulative Index-Digest.* Rochester, Lawyers' Co-operative Pub. Co., 1929 to date. A Ten Year Digest in two volumes covers A. L. R. volumes 1-57; and three additional volumes cover A. L. R. volumes 58-100, 101-125, and 126-150. A cumulative annual volume supplemented by a cumulative pamphlet service keeps the set current.

d. Selected Cases (Special).

*American Bankruptcy Reports Digest.* Albany, M. Bender & Co., 1906 to date. This digest covers volumes 1-49, old series, and volumes 1-32, new series.

*American Maritime Cases Digest.* Baltimore, American Maritime Cases, Inc., 1923-43. 4 vols.

*Negligence and Compensation Cases Common Sense Index.* Chicago, Callaghan & Co., 1942-1947. 2 vols. This set is kept up to date by pamphlet supplements.

*Public Utilities Reports Digest.* Washington, Public Utilities, Inc. 1933-39. 7 vols. and Supps. A-B, 1940.

*U. S. Maritime Commission Reports Digest*, compiled by J. H. Eisenhart, Jr. Baltimore, American Maritime Cases, Inc., 1940. This digest was issued in conjunction with *American Maritime Cases* and covers decisions found in 1 U. S. S. B. (United States Shipping Board), 1 U. S. S. B. B. (United States Shipping Board Bureau), and 1 U. S. M. C. (United States Maritime Commission).

2. Restatements.

The *Restatements* of the law are published by the American Law Institute to provide "a practical *prima facie* statement upon which, unless it is overturned, judgment may rest." The project has been very thoroughly and carefully carried out. For each subject of the law covered by a *Restatement* a tentative draft was first prepared by the Reporter appointed by the Institute. This tentative draft

took the form of a logically arranged statement of principles based upon an exhaustive examination of the case material. The statement of each principle, set forth in black-lettered text, was supported where necessary by comments which set forth reasons for its adoption or rules for its application, and illustrations which contained brief summaries of cases in support of the principle or the comment. These illustrations were not accompanied by citations. Commentaries upon "those sections only concerning which he (the Reporter) feels that the state of existing authority or other difficulties require some reference or discussion in addition to any comment or illustrations which may be found in the tentative draft of the *Restatement*" were published to accompany the Tentative Drafts. These Tentative Drafts were revised after being subjected to criticism by a Committee of Advisers in consultation with the Reporter and a Final Tentative Draft was then circulated widely for criticism by the Bar and the law schools of the country over a period of years. A Proposed Final Draft was then submitted for criticism to the Council and finally at the Annual Meeting of the Institute. The *Restatements* as finally adopted were then published.

There is a regular Library Edition and a Library Edition equipped for the insertion of State Annotations in pocket part form, both in bound form, and a Student Edition in pamphlet form. The following subjects have been issued: *Agency* (2 vols. or 4 pam.), *Conflict of Laws* (1 vol. or 3 pam.), *Contracts* (2 vols. or 4 pam.), *Judgments* (1 vol. or 2 pam.), *Property* (5 vols. or 11 pam.), *Restitution* (1 vol. or 3 pam.), *Security* (1 vol. or 2 pam.), *Torts* (4 vols. or 8 pam.), *Trusts* (2 vols. or 4 pam.), *Model Code of Evidence* (1 vol. or 2 pam.), and *Seavey's & Scott's Notes* (1 vol.). Tentative drafts have been prepared in the following subjects: *Airflight*, *Commercial Code*, *Contribution among Tortfeasors Act*, and *Sales*. A *Code of Criminal Procedure*, Official Draft, was published in 1931 with and without a commentary.

Since the *Restatements* are concerned mainly with the weight of authority, and since they are unsupported by citations to specific cases, it has been found advisable to prepare separate volumes of annotations for each state. These volumes of annotations are of great practical assistance in research for the practicing lawyer. They have not yet been completed for all states in all subjects. The following units of State Annotations (also issued as pocket parts) were published to July 1, 1947:

## AGENCY

Arizona	Kansas	Pennsylvania
California	Maryland	Rhode Island
Colorado	Massachusetts	Texas
Florida	Michigan	Virginia
Georgia	Mississippi	West Virginia
Illinois	Nebraska	
Indiana	Oklahoma	

## CONFLICT OF LAWS

Alabama	Maryland	Pennsylvania
California	Massachusetts	Rhode Island
Colorado	Michigan	South Dakota
Florida	Minnesota	Tennessee
Illinois	Mississippi	Texas
Indiana	Missouri	Virginia
Iowa	New Hampshire	Washington
Kansas	New York	West Virginia
Louisiana	Oklahoma	Wisconsin

## CONTRACTS

Alabama	Massachusetts	Ohio
California	Minnesota	Oklahoma
Colorado	Mississippi	Pennsylvania
Connecticut	Missouri	Rhode Island
Florida	Montana	South Dakota
Georgia	Nebraska	Texas
Illinois	New Hampshire	Washington
Indiana	New Jersey	West Virginia
Iowa	New York	Wisconsin
Kentucky		

## PROPERTY, for volumes 1 and 2

California	Massachusetts	Pennsylvania
Florida	Minnesota	Washington
Maryland	Mississippi	

## For volumes 1, 2 and 3

Illinois

## For volumes 1, 2, 3, 4 and 5.

Alabama

## RESTITUTION

California	Minnesota	Pennsylvania
Florida	Missouri	Rhode Island
Michigan	Ohio	

## SECURITY

Pennsylvania

## TORTS

For volumes 1 and 2

California	Massachusetts	South Dakota
Florida	Missouri	Virginia
Illinois	New Jersey	
Louisiana	Pennsylvania	

For volumes 3 and 4

Florida	Louisiana	Missouri
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## TRUSTS

Arizona	Kentucky	New Jersey
Arkansas	Maine	New Mexico
California	Maryland	New York
Colorado	Massachusetts	Ohio
Connecticut	Michigan	Pennsylvania
Delaware	Mississippi	Rhode Island
Florida	Missouri	South Carolina
Idaho	Montana	South Dakota
Illinois	Nebraska	Texas
Iowa	Nevada	Wisconsin
Kansas	New Hampshire	Wyoming

A careful survey of the State Annotations already issued dispels the widespread impression that the common law is a mass of contradictions. Aside from variations in judicial language in stating propositions of law it has been found that the cases examined show less than a two per cent disagreement with the law as set forth in the *Restatements*. Another surprising fact brought to light in the preparation of State Annotations is the substantial number of legal principles not covered by local law. In some states on specific subjects it ran as high as fifty to seventy-four per cent. Such facts emphasize the importance of the role which the *Restatements* can play in the future development of American law.

In order to provide "an easy access to all those decisions in which the *Restatement* has been cited by Federal Courts and by the Appellate Courts of the States" and also "to the articles and notes in numerous law reviews in which the *Restatement* has been cited," the Institute prepared the work known as the *Restatement in the Courts*, Permanent Edition 1932-1944. This reference tool assists the re-



searcher in evaluating the probable influence of the *Restatement* in a given jurisdiction.

This volume also contains the *History of the American Law Institute and of the First Restatement of the Law* and a *Glossary* which defines terms in the sense in which they were used throughout the *Restatement*.

There is also a good General Index which enables the user to find all places in the *Restatements* in which the various aspects of a proposition of law have been treated.

Because the leading authorities in each category of the law have collaborated in the *Restatement*, the weight accorded the principles set out therein is ordinarily far greater than that given to any treatise. It must be remembered, however, that the American Law Institute does not intend the *Restatements* as treatises but rather as summary statements to be supplemented at a later date by parallel treatises on the respective topics. Three such works have appeared to date:

*Treatise on the Law of Contracts*. Revised edition by Samuel Williston and G. J. Thompson. New York, Baker, Voorhis & Co., 1936-38. 8 vols. Vol. 9, War Contract Claims by Theodore W. Graske, 1945. The set is kept up by pocket parts. A volume of *Selections* . . . has been issued for students.

*Treatise on the Conflict of Laws*, by Joseph Henry Beale. New York, Baker, Voorhis & Co., 1939. 3 vols. A volume of *Selections* has been issued for students.

*The Law of Trusts*, by Austin Wakeman Scott. Boston, Little, Brown & Co., 1939. 4 vols. The set is kept up by pocket parts.

### C. BRITISH LEGISLATIVE MATERIAL

#### 1. Constitutional Material.

It is not within the province of any English court to question the validity or constitutionality of any Act of Parliament. The so-called "conventions of the constitution," therefore, are more a matter of political than of legal interest.

#### 2. Treaty Material.

Foreign Office. British and Foreign State Papers, 1812 to date, contain much useful material.

Parliamentary Papers. This series is also known as the "Sessional Papers"; and the various items, each of which is issued separately, are popularly spoken of as "blue" or "white" papers. They are of two kinds: (1) those submitted

by individuals or committees, etc., in response to an Act of Parliament or an order from either House; and (2) those submitted at the command of the Sovereign. The latter are often referred to as "Command Papers." This series includes much material on foreign relations.

### 3. Statutory Material.

Insofar as the courts are not permitted to consider the reports of debates in Parliament, the reports of committees or commissions, the expressed intentions of the framers of an Act of Parliament, or the legislative history of an Act when construing its provisions, the significance of those materials is almost wholly political and historical.

Materials useful in the construction of statutes.

The official rules for the construction of statutes are set forth in *The Interpretation Act, 1889* (52 & 53 Vict. 63). They are discussed and explained in such works as:

*A Treatise on Statute Law* by William Feilden Craies (4th ed. by Walter S. Scott), 1936.

*The Interpretation of Statutes* by Sir Peter Benson Maxwell (8th ed. by Sir Gilbert H. B. Jackson), 1937.

Annotations in Chitty's *Statutes of Practical Utility*, Butterworth's *Twentieth Century Statutes* and Halsbury's *Statutes of England* contain much valuable material of a secondary character.

### 4. Statutory Rules and Orders.

Historical and editorial notes are printed in the annual volumes and also in the *Statutory Rules and Orders, Revised to December 31, 1903*.

Useful material may be found in *Administrative Procedure in connection with Statutory Rules and Orders in Great Britain*, by John Archibald Fairlie. (University of Illinois Press, Urbana, Illinois, 1927.)

### 5. Rules of Court.

There are very useful annotations in the *Annual Practice*, the *Annual County Courts Practice*, and the *English and Empire Digest* volume covering "Pleading, Practice and New Procedure."

### 6. Local Government Materials.

There are valuable annotations in the following series: *Local Government Law and Legislation* by W. H. Dumsday; Part II of Knight's *Local Government Reports*; *Local*

*Government Annual* by Skottowe (formerly by Macmorran), and *Local Government Law and Administration* by Macmillan (which incorporates the annotations of Skottowe beginning with the 1938 supplement).

## D. BRITISH JUDICIAL MATERIAL

### 1. English Digests.

#### a. Early Abridgments.

*Statham's Abridgment.* It is generally agreed that the first edition of this work was printed about 1490. It included abstracts of cases as late as 1461, or the end of the reign of Henry VI. Many of the cases abstracted can not be found in any published Year Book. A modern edition in two volumes with an English translation was edited in 1915 by Margaret C. Klingelsmith.

*Fitzherbert's Abridgment.* This work was not published until 1514. It includes abstracts of cases no later than 1496-97, the 21st year of the reign of Henry VII.

*Brooke's Abridgment.* This work was published in 1568; but it includes abstracts of cases no later than the year of Brooke's death, 1558. (It is based largely on Fitzherbert).

*Hughes' Abridgment.* This work was published 1660-1662. It is a supplement to Brooke, and includes abstracts of cases from 1558 to 1660.

*Rolle's Abridgment.* This work edited by Sir Matthew Hale, was published in 1668. The following extract from Hale's preface will suffice to describe it: "This ensuing book is a collection of divers cases, opinions and resolutions of the common law, digested under alphabetical titles and those titles subdivided into heads and paragraphs . . . But the principal matter of the book consists of collections out of the *Year Books*, and the latter reports formerly printed out of private reports of other men, and some of the collector's own taking, which were most in the king's bench from about 12 Jacob. regis; there is little in it touching pleas of the crown. It is true, the reader will find many of the cases reported in books lately printed, especially in Mr. Justice Croke's and Sir Francis Moore's *Reports*."

*Viner's Abridgment.* This work was published in 1742-1756 in twenty-three volumes. It is the most ambitious of the abridgments, and is very carefully edited.

*Coventry and Hughes' Analytical Digested Index to the Common Law Reports.* This work was published in 1827. It digests cases from 1216 to 1760.

- b. Modern Digests. After Coventry and Hughes, there were several digests of common-law cases, as well as Edward Clitty's *Index to Cases in Equity and Bankruptcy*. However, the only modern English digests of importance are:

(1) General.

Mews' *Digest of English Case Law* (2d ed.). London, Sweet & Maxwell, 1925-1928. 24 vols. This digest contains the reported decisions of the superior courts and a selection from those of the Scottish and Irish Courts through the year 1924. It digests cases in law and equity; but omits cases which its editors deem of no present value. There is a two volume supplement, 1925-1935, and a Subject Index, 1936-40 (in 1940 volume). Current cases are digested in annual volumes with quarterly cumulative supplements.

Butterworth's *Ten Year Digest* (1898-1907) London, Butterworth & Co., 1908. 4 vols. and Butterworth's *Yearly Digest* from 1908 to date. The scheme of classification is the same as that used in Halsbury's *Laws of England*.

*Law Reports Digests*. This work was published by the Incorporated Council of Law Reporting. It digests only those cases reported in "The Law Reports" and "Weekly Notes" from 1865 to 1912, and thereafter includes nearly all other English cases along with selected cases from Scotland and Ireland. The set consists of:

Consolidated Digest (1865-1890);

Decennial Digest (1891-1900);

Ten Years' Digest (1901-1910);

Ten Years' Digest (1911-1920);

Ten Years' Digest (1921-1930); and

Annual Current Indexes with quarterly cumulative supplements to date.

*English and Empire Digest*. London, Butterworth & Co., 1919-1930. 48 vols. This digest purports to be "a complete digest of every English case reported from early time to the present day, with additional cases from the courts of Scotland, Ireland, the Empire of India, and the Dominions beyond the sea." Its scheme of classification closely approximates that used in Halsbury's *Laws of England*. A special volume covering "Pleading, Practice and New Procedure" was added in 1932. Recent cases are digested in a cumulative annual supplement. Although it is the most comprehen-

sive of British digests, it does not include every case, nor does it treat the cases included in as great detail as do American digests.

(2) Selected (General).

*English Ruling Cases.* London, Stevens & Sons, Boston, The Boston Book Co., 1894-1908. The General Index in the back of Volume 26 and the Subject Matter Index in the back of supplementary Volume 27 cover both cases and annotations.

*British Ruling Cases.* Rochester, The Lawyers Co-op. Pub. Co., 1911-1931. The cases and annotations are indexed in the Index-Digest in the back of Volume 10 and of the latest volume (vol. 16).

*All England Law Reports, Annotated.* London, The Law Journal. There is an annual cumulative Consolidated Index and Table of Cases.

Generally speaking the English digests have not been so well done as the American. The cases digested have not been so thoroughly analysed as they have been in American digests nor have their systems of classification been so painstakingly subdivided.

## E. MISCELLANEOUS MATERIAL

### 1. Loose-leaf Services.

The passage in recent years of a great mass of positive legislation directly affecting industry has given rise to a need on the part of the management, and more especially their legal counsel, for immediate and complete information as to those laws the incidents of which bear on their undertakings. In response to this demand certain private companies evolved the loose-leaf plan of reporting. This plan involves the publication in loose-leaf form of a basic service dealing with each particular phase of the law—e. g., banking, insurance, taxation, trade regulation, labor, etc. This basic service generally includes such matter as:

- (1) Introductory matter describing the service and explaining its use; the text of the statutory provisions;
- (2) Annotations consisting of the texts of regulations and digests of judicial decisions and administrative decisions, rulings, orders, and findings;
- (3) The texts of rules of procedure and evidence;
- (4) Forms;
- (5) A general index and table of cases.

The up-to-dateness of the service is guaranteed by the issuance from time to time of new pages or loose leaves carrying new or current matter—such as, the texts of new statutory or administrative provisions, digests of judicial decisions

or administrative determinations, rules of procedure or evidence, and forms. Some of these new loose leaves are substituted for old, superseded leaves in the basic text; others merely inserted in the proper place in addition to the basic service; while still others are inserted in the New or Current Matter section. Material in this latter section is integrated with the main or basic service by means of Cross-Reference Tables, Finding Lists, or Cumulative Indexes. The various divisions of each service are usually set off from each other by tab cards which are often immediately followed by the tables of contents for their respective divisions.

In addition to texts and digests of primary sources, the services often include much informative editorial discussion of a secondary character, in the form of a treatise and annotations.

This system of reporting has achieved well merited popularity as a timesaver among those students and practitioners whose problems necessitate the rapid accumulation of the most recent applicable legislative, judicial and administrative material.

## 2. Encyclopaedias.

An encyclopaedia of law, or of a particular category of the law, is an alphabetically arranged collection of treatises, each constructed according to a uniform plan and each treating a single topic, the limits of which are so prescribed that the treatises will not overlap and that taken together they will cover the entire field of law or of a particular category of the law. Each such treatise ought to be more than an assemblage of "headnotes arranged horizontally."<sup>18</sup> "The true type of encyclopaedic writing demands a text which consists of a statement of the law as it is deduced from all the authorities by which such law has been established, supported by the citation of all such authorities . . . the true type of encyclopaedia is primarily concerned with the underlying principles and hence must consider carefully and show the interrelationship of all cases having to do with the principle or rule of law under investigation."<sup>19</sup> Unfortunately, this is an ideal which is seldom approximated in practice. For, although, on the one hand, some of the articles in encyclopaedias indicate that their writers have made a thorough study of the cases cited; others indicate little more than a casual acquaintance with headnotes on the part of their authors. Frequently an article may be reliable in some parts and misleading in others. An en-

<sup>18</sup> See Zechariah Chafee, Jr., in 30 *HARV. L. REV.* 300.

<sup>19</sup> Kiser, *Principles and Practice of Legal Research*, 2.

cyclopaedia is, however, often very helpful in furnishing a general survey of a topic or a portion of a topic, but its chief function remains that of a digest. It is another valuable tool in the search for applicable judicial precedents. No statement in it should be accepted at its face value, however, until verified through a careful study of the decisions cited to sustain it.

a. American Encyclopaedias.

*American and English Encyclopaedia of Law.* Northport, L. I., N. Y., Edward Thompson, 1887-1896. 31 vols. This work covers both substantive law and evidence.

*American and English Encyclopaedia of Law.* 2d ed. Northport, L. I., N. Y., Edward Thompson, 1896-1905. 32 vols. This edition with its five volume supplement, 1905-1908, covers both substantive law and evidence.

*Encyclopaedia of Pleading and Practice.* Northport, L. I., N. Y., 1895-1902. 23 vols. This work and its four-volume supplement, 1903-1909, treats procedural law in such a manner that in combination with the second edition of *American and English Encyclopaedia of Law* it includes the whole field of the law.

*Encyclopaedia of Forms and Precedents.* Northport, L. I., N. Y., J. Cockerott, 1896-1904. 18 vols.

*American and English Encyclopaedia of Law and Practice.* Northport, L. I., N. Y., Edward Thompson Co., 1909. vols. 1-5. Only five volumes were published covering A-Assignment.

*Cyclopedia of Law and Procedure.* New York, The American Law Book Co., 1901-1912. 40 vols. This set is popularly known as CYC. Annual supplements were issued through the year 1931.

*Corpus Juris.* Brooklyn, The American Law Book Co., 1914-1936. 72 vols. This is really a new edition of CYC and meant to replace it. On the whole it is much better written. Supplementary volumes were issued periodically to keep the citations up to date and to permit necessary additions to the text. The following supplements are necessary to complete the set: First Permanent Annotations, 1914-1921; Second Permanent Annotations, 1922-1926; Third Permanent Annotations, 1927-1931; and Annual Annotations, 1931 to date.

*Corpus Juris Secundum.* Brooklyn, The American Law Book Co., 1936-. In this new edition the text is restated when necessary and is supported with citations to cases decided since the publication of the text on the same subject in *Corpus Juris*. Cases decided prior to the publication of the text in *Corpus Juris* are included

merely by references to *Corpus Juris*. It is necessary for the practitioner to have both sets in order to have all citations on a given subject. Both sets arrange their material under approximately 400 topics which correspond closely to those used in the *American Digest System*. An outline of the scheme of classification with notes of any differences between the *C. J.-C. J. S.* and the *American Digest System* is included in *Legal Research by the Use of Corpus Juris Secundum and Corpus Juris*, a pamphlet by Donald J. Kiser. It is the claim of the editors that the *C. J.-C. J. S.* system is "a complete and systematic statement of the whole body of the law, as embodied in and developed by all reported decisions." *Corpus Juris Secundum* is kept up to date in text and citations to authorities by annual pocket supplements. There is a Descriptive-Word Index and Concordance (vol. 72) for *Corpus Juris*, and indexes for the individual volumes of *Corpus Juris Secundum*. A general index for the latter will probably be issued on the completion of the set. Each topic is preceded by a detailed topical analysis in both *C. J.* and *C. J. S.* There is no table of cases.

*Standard Encyclopaedia of Procedure*. Los Angeles, L. D. Powell, 1911-1926. 26 vols. Supplements were added.

*Encyclopaedia of Evidence*. Los Angeles, L. D. Powell, 1902-1909. 14 vols. A one volume supplement was added in 1919.

*Ruling Case Law*. Rochester, Lawyers Co-operative Pub. Co., 1914-1921. 28 vols. A "Permanent Supplement" in 8 volumes was added in 1929-1930. The latter is kept up to date by pocket supplements. Its publishers assert this work to be "at once a digest of particular reports and a compendium of the entire body of the law as developed by *United States Supreme Court Reports*, *L. Ed.*, *American Law Reports* (Annotated), *Lawyers' Reports Annotated*, *American Decisions*, *American Reports*, *American State Reports*, *American and English Annotated Cases*, *American Annotated Cases*, *English Ruling Cases*, and *British Ruling Cases*." As a cyclopedic digest of the reports named, it is useful in that it does away with the necessity of having recourse to the digests of the respective sets.

*American Jurisprudence*. Rochester, Lawyers Co-operative Pub. Co., 1936-1948. This set is a complete revision of *Ruling Case Law*. It differs from the preceding work in that it includes citations to the *Restatements*, to legal periodicals, and to decisions not pub-



lished in the annotated series which have cited *Ruling Case Law* as authority. It is kept to date by pocket parts.

b. English Encyclopaedias.

*Encyclopaedia of the Laws of England*. London, Sweet & Maxwell, 1897-1898. 12 vols. Supplement, 1903. 1 vol. This is a mere cyclopaedic digest.

*Encyclopaedia of the Laws of England*. 2d ed. London, Sweet & Maxwell, 1906-1909. 15 vols. Supplements, 1913, 1 vol.; 1918, 1 vol.

*Encyclopaedia of the Laws of England*. 3d ed. London, Sweet & Maxwell, 1938- . vols. 1- .

*Halsbury's Laws of England*. London, Butterworth & Co., 1907-1917. 31 vols. It was kept to date by an annual cumulative supplement until 1942. In form it is similar to the American legal encyclopedias.

*Halsbury's Laws of England*. 2d ed. edited by Lord Halsbury. London, Butterworth & Co., 1931-1942. 37 vols. It is kept to date by an annual cumulative supplement.

*Encyclopaedia of Forms and Precedents other than Court Forms*. London, Butterworth & Co., 1902-1909. 17 vols.

*Encyclopaedia of Forms and Precedents other than Court Forms*. 2d ed. London, Butterworth & Co., 1925-1926. 20 vols. It is kept to date with annual cumulative supplements.

*Encyclopaedia of Forms and Precedents other than Court Forms*. 3d ed. London, Butterworth & Co., 1939- . vols. 1- . This edition will be kept to date by pocket supplements. It will be provided with cross references to the *English and Empire Digest*, to *Halsbury's Complete Statutes of England*, and to the *All England Law Reports*.

*Encyclopaedia of Court Forms and Precedents in Civil Proceedings*, edited by Lord Atkin, London, Butterworth & Co., 1937. vols. 1- .

3. Textbooks and Treatises.

Textbooks and treatises vary in authority and usefulness. A few only have survived the test of time. Glanvill, for example, is commonly accepted as conclusive, for the original sources from which he formulated his statements are now largely unavailable. The same is true of much of Bracton. Britton and Fleta, drawn largely from Bracton, however, are not so unreservedly accepted. Littleton's *Tenures* is still highly esteemed; and the writings of Lord Coke, while no longer regarded as the pronouncements of an ultimate

authority, are generally respected. Indeed, most of the treatises mentioned are usually accorded a respect almost equal to that awarded judicial precedents. Next in importance, is another class of books which have had great influence on the development of the law; such as, Blackstone's *Commentaries*, Kent's *Commentaries*, the works of Story, and Cooley's *Constitutional Limitations*. Contemporary books in the same category are Gray on the Rule against Perpetuities, Scott on Trusts, Wigmore on Evidence, and Williston on Contracts. In such treatises the writers have attempted not only to make a clear presentation of the then existing state of judicial opinion, but also to examine critically the grounds upon which it rests and to formulate their own reasoned conclusions with regard to what it ought to be. These books represent the results of lifetimes of scholarly research and keen analysis, and have more inherent worth than the decisions of the vast majority of our too busy courts. Though under the doctrine of *stare decisis*, they have not the authority of judicial precedent, their influence in shaping the law may safely be said to exceed that of the reported decisions of very many of our appellate tribunals. Unfortunately, it must be said that the vast majority of our textbooks are not of this quality. The best of them serve a useful purpose similar to that of an article in a standard encyclopedia, but many of them are comparatively worthless. At best, they provide a starting point in a search for authorities with a very general survey of the topic in question; but often they are misleading as to the state of the law. Familiarity with the names of the best texts and treatises is, therefore, a necessity.

#### 4. Law Dictionaries.

The first English law dictionary was Rastell's *Expositiones Terminorum Legum Anglorum* published in 1538; the first American law dictionary was Bouvier's *Law Dictionary* published in 1839. Many works, often loosely referred to as dictionaries, merely collect definitions which either courts or legislatures have made. Such definitions must be read in the light of their context. It is important to remember that excerpts of this character can never be relied upon as ultimately determining the general legal meaning of a word or phrase.

##### a. American.

Bouvier, John. *Law Dictionary and Concise Encyclopedia* (Rawle's 3d ed.), St. Paul, West Pub. Co., 1914. The same edition was also issued in three volumes. This is perhaps the best American law dictionary.

Ballentine, James A. *Pronouncing Law Dictionary*, Rochester, Lawyers Co-operative Pub. Co., 1930.

Black, Henry Campbell. *Law Dictionary*. 3d ed., St. Paul, West Pub. Co., 1933.

*Cyclopedic Law Dictionary*. 3d ed. Chicago, Callaghan & Co., 1940.

*Judicial and Statutory Definitions of Words and Phrases* (commonly known as "Words and Phrases"). Permanent Edition, 1658 to date, with modern pocket part supplementation. St. Paul, West Pub. Co., 1940. 45 vols.

b. English.

Byrne, W. J. *Dictionary of English Law*. London, Sweet & Maxwell, 1923.

Hughes, G. R. *The Pocket Law Lexicon*. 6th ed. London, Stevens & Sons, 1942.

Hughes, G. R. *The Students Law Dictionary*. 6th ed. London, Stevens & Sons, 1936.

Mozley, H. N. and Whitely. *Concise Law Dictionary*. 5th ed. London, Butterworth & Co., 1930.

Osborn, P. G. *Concise Law Dictionary for Students and Practitioners*. 2d ed. London, Sweet & Maxwell, 1937.

Stroud, D. A. *Judicial Dictionary of Words and Phrases Judicially Interpreted*. 2d ed. London, Sweet & Maxwell, 1903. 3 vols. Supp. 1931.

Sturgess, H. A. C. & A. R. Hewitt. *A Dictionary of Legal Terms, statutory definitions and citations*. 2d ed. London, Isaac Pitman, 1940.

Wharton, J. J. S. *Law Lexicon*. 13th ed. London, Stevens & Sons, 1925.

*Words and Phrases Judicially Defined*, by Roland Burrows. London, Butterworth & Co., 1943-1945. 5 vols. (companion to Hailsham's ed. of Halsbury's Laws of England.) Pocket Parts. It contains sections on

(1) Interpretation of Documents, and

(2) General Principles of Drafting.

5. Legal Periodicals.

At the present time, there are current in the United States more than fifty legal periodicals, such as the *Harvard Law Review*, published by various law schools; several more, of a general nature, such as the *New York Law Review*, not published by law schools, and more than a dozen periodicals, such as the *Air Law Review*, devoted to special topics. In addition to these periodicals, there are many others, such as the *American Bar Association Journal*, published as the official organs of bar associations. All these legal periodicals

are fruitful sources of information. They contain articles written by leading judges, professors, and lawyers, on all phases of the law. Moreover, they generally contain editorial comments on recent decisions, legislation, and administrative rulings, etc., by the most brilliant students in our schools. The material found in these periodicals is very often of even greater value than the treatment of the same problem in a ranking treatise or textbook, since considerations of time and of space ordinarily require a less detailed analysis of the topic in works of the latter type. Courts have tended to give an ever increasing weight to the thorough and scholarly treatments of difficult points of law which are found in articles and editorial comments in the foremost law reviews. Indeed, this material is deemed to be of such value that Shepard's *Citations* now includes, as part of the history of a case, citations to those local legal periodicals which deal with it. There is still another common feature of these periodicals which cannot be overlooked by the student or the practitioner; to wit, the book review and book note sections, commonly included, which evaluate the latest contributions to legal literature.

In the use of articles in legal periodicals the same painstaking discrimination is necessary as in the use of treatises and of articles in legal encyclopedias.

A brief history of legal periodicals and a list of them, British and American, will be found in Hicks (3d ed., 1942), pages 196-221 and 512-570.

A list of current legal periodicals with publishers and prices is printed in *Legal Bibliography and the Use of Law Books* by Arthur S. Beardsley and Oscar C. Orman (2d ed., 1947), pages 367-375.

#### 6. Annotations to Legislation and Selected Cases.

The annotations found in works containing reprints of constitutions, legislation, and selected judicial decisions include within a comparatively narrow compass a vast amount of material rich in "leads." The annotations to legislative material usually consist of historical notes, editorial comments, cross references, and notes of decisions. Liberal use is generally made of quotations from the documents cited, and brief statements of the facts and summaries of the conclusions of the court in decisions interpreting the provisions of statutes are very often set out along with the titles and citations of the cases in point. Case annotations vary in style from a mere list of important cases in point to an exhaustive analysis of the point treated with summaries of the cases cited in such form as to bring out the facts necessary to an understanding of the distinctions between

them. They vary in length from a few lines to over a hundred pages. Excellent case annotations are found in the *American Law Reports*. However, since annotations vary in completeness and reliability with the industry and ability of the editors, the same exacting discrimination is necessary here as in the use of all other secondary material.

### III. KEY MATERIAL—INDEXES, TABLES, ETC.

#### A. INDEXES

#### 1. American Legislative Material.

##### a. Constitutional Material.

##### (1) Federal.

##### (a) Legislative History.

*The Records of the Federal Convention* by Max Farrand has both a clause index, by which a clause can be traced through its various stages in the Convention, and a general index.

*Documents Illustrative of the Formation of the Union of the American States* compiled by Charles C. Tansill has an analytical subject and name index.

*The Constitution and the Courts*, 3 vols. has a general index to Meigs, *The Growth of the Constitution* and to Calvert's *Constitutional Construction and Interpretation and Notes on the Constitution*. The table of contents lists each article, section, and clause of the Constitution.

*Debates in the Several State Conventions* edited by Jonathan Elliot includes a digest of the Constitution and a general and analytical index.

*The Federalist* in its various editions usually has either a general index or a synoptical table of contents.

##### (b) Construction and Interpretation.

There are elaborate indexes both to the provisions of the Constitution and to the notes in the following: *The Constitution of the United States, Amended to January 1, 1938, Annotated* (Sen. Doc. 232, 74th Cong., 2d sess.); *The United State Code Annotated*; *The Federal Code Annotated*, and *Notes on the Constitution* by Thomas H. Calvert, in *The Constitution and the Courts*.

##### (2) State.

##### (a) Legislative History.

As a general rule the proceedings of state constitutional conventions are not as well indexed as

are the proceedings of the Federal constitutional convention. They are therefore difficult to use.

(b) Construction and Interpretation.

The majority of the states now have annotated compilations of laws. The state constitution is usually to be found in the first volume of such compilations. Copies of the state constitution in annotated form may also often be obtained from the Office of the Secretary of State, the State Librarian, or the State Printer.

(c) Comparison of State Constitutions.

The following collections of state constitutions are available for comparative studies:

*The Federal and State Constitutions*, edited by Ben Perley Poore. 2d ed., 1878. 2 vols.

*The Federal and State Constitutions*, edited by Francis N. Thorpe. 1907. 7 vols.

*The State Constitutions and the Federal Constitutions and Organic Laws of the Territories and Other Colonial Dependencies of the United States of America*, compiled and edited by Charles Kettleborough. 1918.

*Constitutions of the States and United States*, which is Volume 3 of the "Reports of the Constitutional Convention Committee of New York," 1938.

*Digest of State Constitutions*, edited by J. H. Newman, State Librarian, for Ohio Constitutional Convention Commission, 1912.

*Index Digest of State Constitutions*, prepared for the New York State Constitutional Convention Commission, 1915.

b. Treaty Material.

(1) Treaties with Foreign Nations.

The most effective aids in finding treaties are the lists published by the Department of State described below. A *Subject Index of the Treaty Series and Executive Agreement Series* (Publication 291) was issued by the State Department in 1932. This publication is now out of print but the lists therein included may be found in the short print of Volume 1 of Hunter Miller's *Treaties and Other International Acts*.

*List of Treaties submitted to the Senate, 1789-1934*. (State Department Publication 765). This contains a list of all treaties submitted to the Senate, 1789-1934, including those that did not go into effect; notes to treaties listed; treaties pending in

the Senate; treaties awaiting further proceedings; numerical list of the Treaty Series; and a list of the sessions of Congress and special sessions of the Senate with the dates thereof. The following supplement has been issued:

*Treaties submitted to the Senate, 1935-1944*, procedure during 1935-1944 on certain treaties submitted to the Senate, 1923-1944 and status thereof on Dec. 31, 1944. 1945, 28 pages. (State Dept.)

*List of Treaties submitted to the Senate, 1789-1931, which Have Not Gone into Force* (1932). (State Department Publication 382.)

*General Index to Laws. . . . 1789-1827*, compiled by Samuel Burch, and *Synoptical Index to the Laws and Treaties, 1789-1851*, list and index treaties, by countries.

*18 Statutes at Large, part 2 (Revised Statutes of the United States relating to the District of Columbia, etc.)* contains a "List of Treaties, Chronologically Arranged," and an "Index to Public Treaties" for the period 1778 through 1873.

*Index to Federal Statutes, 1874-1931*. On pages 1137-1148 of this index there is a list of treaties arranged by countries. Citations to the Statutes at Large are given.

*Department of State Bulletin*, formerly *Treaty Information Bulletin* (weekly). Published by the State Department since October, 1929. It contains current information on treaties. A supplement to Bulletin No. 39, *Treaty Information, December 31, 1932* (Publication 436), contains a classified list of treaties in force on December 31, 1932. This in turn has been supplemented by *Treaties in Force, A List of Treaties and Other International Acts of the United States in Force on December 31, 1941* (Publication 2103 (1944)). Treaties therein contained are classified under five principal headings, Promotion of Peace, Political, Humanitarian, Economic and Miscellaneous. The list contains references where a treaty or agreement may be found in the Statutes at Large, Treaty Series, Executive Agreement Series, Malloy, or League of Nations Treaty Series. The index is by country and subject matter.

*Manual of Collections of Treaties and of Collections Relating to Treaties* prepared by Denys P. Myers. Cambridge, Harvard University Press, 1922. This manual is perhaps one of the most

valuable guides to treaty materials. It is not an index to individual treaties but a comprehensive catalog of treaty collections. The material is arranged under four main headings. General Collections, Collections by States, Collections by Subject Matter, and International Administration. There is a subject-matter index.

*A Digest of International Law*, by John Bassett Moore. Washington, Govt. Print. Off., 1906. 8 vols.

*A Digest of International Law*, by Green H. Hackworth. Washington, Govt. Print. Off., 1940-1944. 8 vols.

*History and Digest of International Arbitration, etc.*, by John Bassett Moore. Washington, Govt. Print. Off., 1898. 6 vols.

*International Adjudications, etc.*, by John Bassett Moore. New York, Oxford Univ. Press., 1929. 4 vols.

*Digest of the Published Opinions of Attorneys General . . . with reference to International Law, Treaties, etc.*, by John L. Cadwalader. Rev. ed. Washington, Govt. Print. Off., 1877.

*Index to the Opinions of the Attorneys General of the United States . . .* containing: (1) List of Attorneys General; (2) List of Opinions in Chronological Order; (3) Digest of Decisions and References to Subjects (alphabetically arranged); (4) List of Acts Cited. Washington, C. Alexander, Printer, 1852. (H. Exec. Doc. No. 55, 31st Cong., 2d sess.)

*Digest of Opinions of the Attorneys General, 1789-1876*, by Christopher C. Andrews.

*Digest of the Opinions of the Attorneys General, 1789/1881-1906/1921* (vols. 1/16-26/32) in 3 volumes.

As an aid in finding historical material relating to treaties the following may be mentioned:

*Papers Relating to the Foreign Relations of the United States*, usually referred to as *Foreign Relations*. Each volume is indexed separately and there have been two general indexes: one for years prior to 1900 entitled *General Index to the Published Volumes of the Diplomatic Correspondence and Foreign Relations of the United States, 1861-1899* (1902) and *Papers Relating to the Foreign Relations of the United States, General Index 1900-1918* (1941). This latter index does not



cover the volumes for the years 1914-1918 dealing with the World War and the Russian Revolution.

*Index to United States Documents Relating to Foreign Affairs, 1826-1861.* This index was edited by Adelaide Hasse for the Carnegie Institution (Carnegie Institution Publications, No. 185, 1914-21). 3 vols.

(2) Indian Treaties.

*Indian Affairs, Laws and Treaties*, compiled to June 29, 1938, edited by Charles J. Kappler. 5 vols. Volume 4 contains index for volumes 1 through 4. Volume 5 has its own index.

*Handbook of Federal Indian Law*, by Felix Cohen. Washington, Govt. Print. Off., 1942. Contains valuable references to Indian treaties. It is well indexed.

c. Statute Material.

(1) Federal.

(a) Indexes to Statutes.

*General Index to the Laws . . . from March 4, 1789, to March 3, 1827, including all Treaties Entered into between Those Periods, etc.*, compiled . . . by Samuel Burch. Washington City, William A. Davis, 1828. This index includes personal, private and local acts.

*Synoptical Index to the Laws and Treaties . . . from March 4, 1789 to March 3, 1851.* Boston, C. C. Little and J. Brown, 1852. This index covers local, personal, and temporary laws as well as general and permanent.

*Consolidated Index to the Statutes at Large . . . from March 4, 1789 to March 3, 1903.* Washington, Govt. Print. Off., 1906. 4 vols. This index is not generally available since only 25 copies were printed. Copies may be consulted in the Library of Congress and in the Library of the U. S. Senate.

*Index Analysis of the Federal Statutes (General and Permanent Law), 1789-1873*, compiled by Middleton G. Beaman and A. K. McNamara. Washington, Govt. Print. Off., 1911.

*Index to the Federal Statutes, 1874-1931, General and Permanent Laws contained in the Revised Statutes of 1874 and Volumes 18-46 of the Statutes at Large*, compiled by Walter H. McClenon and W. C. Gilbert. Washington,

Govt. Print. Off., 1933. This index includes laws intended to be of a permanent character at the time of their passage; provisions repealed; provisions superseded; and provisions no longer in force.

*Revised Statutes*, 1873 and 2d ed., 1878. There is an index in the back of these volumes.

It should be noted that the topic approach to the *Revised Statutes* and the *United States Code*, *United States Code Annotated*, *Federal Code Annotated* is hampered by the fact that material on a given topic may be classified in two or more categories. It is, therefore, necessary to rely heavily on the general indexes in using these works.

*United States Code* (1946 ed.). There is an elaborate index in a separate volume. The index to the cumulative supplement is in the back of the volume.

*United States Code Annotated* and *Federal Code Annotated* have general index volumes which are kept up to date by annual pocket parts.

*United States Code Congressional Service*. Each bound volume is indexed and the pamphlet supplements carry cumulative indexes.

The Legislative Reference Service, Federal Law Section, of the Library of Congress maintains an elaborate index on cards of Federal legislation which includes a section on temporary, private, local, and special as well as permanent, public, and general acts, etc.

Other than the *General Index*, 1789-1827, and the *Synoptical Index*, 1789-1851, there is no published index of temporary, private, local, and special acts. To find them when only the date is known it is necessary to use the index or the chronological list in part 2 of the proper volume of the *Statutes at Large* or for recent acts the index to the *U. S. Code Congressional Service*.

Temporary Acts such as the War Powers Acts are included in the *U. S. Code*, official and annotated editions.

The *District of Columbia Code*, 1940 ed., includes Federal laws of a local nature which are general in their application to the District.

*Digest of Public General Bills*, published

since 1936 by the Legislative Reference Service, Federal Law Section, of the Library of Congress, contains in addition to notes on the progress of bills and a digest of their provisions, a subject index. Bills are arranged by number.

The *U. S. Code Congressional Service* also indexes bills.

(b) Catalogs of Committee Reports and Hearings.

*Checklist of United States Public Documents, 1789-1909* (3d ed., 1911). This is not an analytical dictionary catalog. Committee reports and hearings are listed under the names of the committees in which they originated. Where a report or hearing is part of a numbered series, no title is given. The entry simply refers to the volume number, part number, series title, and document or report number. This fact, as well as the lack of an index, makes any use of this *Checklist* difficult.

*Semi-monthly List of Selected United States Government Publications* (July 11, 1928 to date). This is a subject index. Reports and Hearings are listed under the headings "Reports" and "Hearings" respectively.

*Monthly Catalog of United States Public Documents* (January 1895 to date). The catalog for each month is generally published at the end of the next succeeding month. As in the *Checklist*, reports and hearings are arranged in the catalog under the names of the committees in which they originate. A subject index, however, is issued at the end of each year.

*Catalogue of Public Documents of . . . Congress and all Departments of Government of the United States* (1895 to date). This catalog known as the *Document Catalog*, is issued biennially. It supersedes the *Monthly Catalog* for the same period. Reports and hearings are recorded under the subjects included with cross references to them listed under the bill and resolution numbers and the names of committees.

*Calendar of the House of Representatives (Daily Edition)*. Committee reports may be

found by an examination of the legislative history which is recorded after the bill number in the numerical list of bills and resolutions. A subject index is issued on Monday of each week.

*Calendar of the House of Representatives and History of Legislation (Final Edition).* In addition to a complete legislative history of all bills and resolutions which have become law, and of bills which have failed to become law, it contains a separate list of bills which were killed by the executive's "Pocket veto."

*Congressional Record.* In the bi-weekly and final indexes the history of bills and resolutions is carried under the bill number.

*Index of Congressional Committee Hearings (not confidential in character) prior to March 4, 1935, in the United States Senate Library (1935) and Supplement for January 3, 1935 to January 3, 1939.* Hearings are recorded under subject, committee, and bill number. The bill number index is of little use to anyone who is without access to the Senate Library because the references given therein are available only in that library.

*Index of Congressional Committee Hearings prior to Jan. 3, 1939, in Library of House of Representatives,* compiled by W. Perry Miller.

*Congressional Record.* Committee Reports may be located by means of the legislative history which is given after the bill number in the numerical list of bills and resolutions. There are eight of these numerical lists; Senate bills; Senate joint resolutions; Senate concurrent resolutions; Senate resolutions; House bills; House joint resolutions; House concurrent resolutions; and House resolutions.

## (2) State.

### (a) Indexes to Statutes.

Session laws, compilations, revisions, and codes are for the most part elaborately indexed both in official and unofficial publications. Systems of indexing and classification, however, vary not only from state to state but also from one publication to another. It is necessary, therefore, to search the subject from many different angles and under many different aspects.

The general and permanent legislation of all states is indexed in the following:

*New York State Library Bulletin. Legislation.* (Albany, 1899-1910.) This set is made up of: vol. 1, Legislation by States, 1890-94; vol. 2, 1895-98; vol. 3, 1899-1901; vol. 4, 1902; vols. 5-10, 1903-08. Volumes 1-4 are Comparative Summaries and Indexes; Volumes 5-10, Year Books of Legislation.

*Loose-Leaf Index to Legislation*, compiled and edited by G. Elstner Woodward. Ann Arbor, Bureau of Government, University of Michigan, 1919- .

*State Law Index; an Index and Digest to the Legislation of the States of the United States*, 1925/26 to date. Washington, Govt. Print. Off., 1929 to date. This index is prepared by the State Law Section of the Legislative Reference Service of the Library of Congress. It is kept current by the *Monthly Summary of State Legislation* which is issued by the same authority in processed form.

*State Law Index Special Report Series*, 1938-1942. It is proposed to print in this series annual bibliographies, such as *Sources of Information on Legislation*—a list of all published material official and unofficial, reporting the legislative bills and enactments of the various State legislatures.

*State Law Digest Report Series*, 1938-1945. In this series will be published bibliographical information concerning such topics as *Current Ideas in State Legislatures*.

*C. C. H. Advance Session Laws Reports*. Indexes and reports new laws as passed by state legislatures immediately following approval or enactment either for selected states, all subjects, or for selected subjects, all states.

Special subject loose-leaf services index and report basic legislation on their respective subjects and also, currently, the new laws passed.

- (b) Catalogs of Committee Reports, Hearings, etc.

*Monthly Checklist of State Publications*, 1910 to date. Washington, Govt. Print. Off., 1910 to date. This work lists only those documents which are received by the Library of Congress. It is, however, reasonably comprehensive.

*State Publications; a Provisional List of the Official Publications of the Several States of the United States from their Organization*, edited by Richard R. Bowker. New York, The Publishers' Weekly, 1908. 4 vols.

Special subject loose-leaf services index and report documents setting forth the legislative history and interpretation of the basic law on their respective subjects as well as on the new laws passed.

(3) Indians.

*Indian Affairs, Laws and Treaties*, compiled to June 29, 1938, edited by Charles J. Kappler. 5 vols. Volume 4 contains index for volumes 1 to 4. Volume 5 has its own index.

*Statutory Compilation of Indian Law Survey* (1940), edited by Felix Cohen. 46 vols. mimeographed.

*Handbook of Federal Indian Law*, by Felix Cohen. Washington, Govt. Print. Off., 1942. Contains valuable references to Indian treaties, also an excellent bibliography, in addition to a discussion of general laws relating to Indians. It is well indexed.

d. Rules and Regulations of Administrative Commissions, Boards and Officers.

(1) Federal.

(a) Old Material.

The *Monthly Catalogue of United Nations Public Documents* (1895 to date). Materials are arranged in the catalog under the names of the issuing offices. A subject-index to the catalog is issued annually.

The biennial *Document Catalog* (1893 to date). This is an analytical dictionary-catalog with entries under both the issuing authority and the subject matter.

(b) Current Material and That Now in Force.

The *Federal Register* (1936 to date). Monthly, quarterly, and annual indexes are published for the daily issues of this publication.

*Code of Federal Regulations* (1938 to date). Index to basic set and indexes to volumes of Cumulative Supplement, and to Annual Supplements. (New Code to appear in 1949.)

*The United States Law Week* (1933 to date). A bi-monthly and semi-annual cumulative General Topical Index are issued.

The *United States Code Congressional Service*. Cumulative index in pamphlets and a full index in bound annual volumes.

*C. C. H. Federal Administrative Procedure*. General Topical Index to the basic compilation, and the Cumulative Index to new developments and new matters.

Pike and Fischer's *Administrative Law Service* has a general index to basic work and a cumulative index to current material.

Loose-leaf services are available, as well, for the various fields of administration. These are all elaborately indexed.

(2) State.

*Monthly Checklist of State Publications* (1910 to date).

Indexes for the loose-leaf services are also available for the various fields of state administration.

e. Proclamations and Executive Orders.

(1) Federal.

The proclamations and Executive Orders of the President of the United States are listed in:

The various indexes to the *Statutes at Large* and

The indexes to both the *United States Code Annotated* and to the *Federal Code Annotated*.

There are two special indexes:

*Presidential Executive Orders*, Oct. 20, 1862 to Dec. 29, 1938, compiled by W. P. A. Historical Records Survey . . . New York, Archives Publishing Co. (a division of Hastings House), 1944. 2 vols. (vol. 1, List of Executive Orders No. 1-8030, vol. 2, Index).

*List and Index of Presidential Executive Orders*, unnumbered series, edited by Clifford L. Lord. Newark, Historical Records Survey, Work Projects Administration, 1944, 389 pages.

*U. S. Code Congressional Service* carries them in the annual index. They are also listed in the following publications:

The *Monthly Index*, under the heading President of the United States, and in its annual index under the special subject;

The biennial *Document Catalog* both under the heading President of the United States and under the special subject;

The *Federal Register* in its monthly and annual index under the heading President of the United States; and

The loose-leaf services which cover the respective fields affected by the Proclamations and Orders.

(2) State.

The Proclamations and Executive Orders of governors are indexed in the volumes of session laws and in the various collections of Messages and Papers.

The loose-leaf services which cover the respective fields affected by the Proclamations and Orders.

f. Rules of Court.

(1) Federal.

*United States Code Annotated.* General Index.

*Federal Code Annotated.* General Index.

*United States Supreme Court Digest*, Vol. 16. Each set of rules is indexed separately.

*Federal Rules Service.* Federal Index.

Babbitt. *New Federal Rules of Civil Procedure, etc.* This volume contains separate indexes to: Federal Rules of Civil Procedure; Rules of Federal Criminal Appellate Procedure; and Revised Rules of the Supreme Court.

*Cyclopedia of Federal Procedure, Civil and Criminal*, 2d ed. There is a general index in Volume 14 which is supplemented by the index in the back of the annual Cumulative Supplement.

Moore. *Federal Practice.* There is an index in Volume 3 which covers the matter in all three volumes.

Ohlinger. *Jurisdiction and Practice of the Courts of the United States.* Rev. ed. There is a separate index for each volume.

(2) State.

The rules of court of the various state and federal courts may be found by means of a chart of court rules which was published as part of *Court Rules —Where to Find Them*, by Helen Van G. Harris, in 33 *Law Library Journal* 127-129 (July, 1940).

Local practice books usually contain indexes for the rules of local state courts.

g. Rules of Procedure of Departmental Courts, Bureaus, and Administrative Agencies.

(1) Federal.

Graske. *Federal Reference Manual.* This volume contains separate indexes for: Federal Trade Commission; General Land Office; National Bituminous Coal Commission; United States Board of Tax Appeals; and United States Tariff Commission. 1939.



*Code of Federal Regulations.* Indexes to volumes Cumulative Supplement, 1943, and indexes to later annual supplements.

*Federal Register.* Rules of procedure are listed in the monthly and annual indexes under the names of the agencies.

*Loose-leaf Services.* The services include the rules of procedure for the respective agencies and index them in their cumulative indexes.

*C. C. H. Federal Administrative Procedure.* General Topical Index to the basic compilation, and the Cumulative Index to new developments and new matters.

Pike and Fischer's *Administrative Law Service* has general index to basic work and a cumulative index to current material.

The *United States Law Week* and The *United States Congressional Service* index selected rules.

(2) State.

The indexes of the loose-leaf services for state administrative law are the only generally available keys to the rules of procedure for state agencies.

2. English Legislative Material.

(a) Treaty Material.

League of Nations. *Treaty Series.* General Index, 1920-31 (Vols. I-CVIII). 4 vols.

Indexes to "Sessional Papers" listed below.

(b) Statute Material.

(1) Indexes to Statutes.

*Chronological Table and Index of the Statutes.* 2 vols. (Annual).

Vol. 1: "Chronological Table of All the Statutes."

Vol. 2: "Index to the Statutes in force."

*Consolidated Table of Statutes arranged in Chronological Order* (Volume 21, Halsbury's Statutes of England, 1931) supplemented by Chronological Table of Statutes in annual cumulative supplements.

*General Index* (Volume 22, Halsbury's Statutes of England, 1931) supplemented by Index in annual cumulative supplements.

*Index to Local Acts*, consisting of Classified Lists of the Local and Personal and Private Acts from 44 Geo. III (1801) to 62-3 Vict. (1899). London, H. M. Stationery Off., 1900.

(2) Catalogues of Committee Reports and Hearings.

*Catalogue of Parliamentary Papers*, 1801-1900, with a few of earlier date (London, P. S. King & Son). Supplementary volumes have been published for the years 1901-1910, and 1911-1920.

(a) Official Indexes to Parliamentary Papers—  
House of Commons.

*General alphabetical index* to the bills, reports, estimates, accounts, and papers presented by order of the House of Commons, and to the papers presented by command (London, H. M. Stationery Office).

1852-1899 (1909).

1900-1909 (1912) (Parl. 1911, H. of C. Reports & Papers, 351).

1910-1919 (1927) (Parl. 1927, H. of C. Reports & Papers, 169).

1920-1928/29 (1931) (Parl. 1930, H. of C. Reports & Papers, 8).

*General index of Accounts and Papers*, Reports of Commissioners, Estimates, etc. printed by order of the House of Commons or presented by command:

1801-1852 (1853).

1801-1852 (1938) H. of C. Reports (Reprint).

*General Index* to the bills printed by order of the House of Commons, 1801-1852 (1854).

*General Index* to bills, reports, accounts and other papers printed by order of the House of Commons:

1801-1832 (1833) (Parl. 1833, H. of C. Reports & Papers, 737).

1832-1844 (1845) (Parl. 1845, H. of C. Reports & Papers, 396-I).

1845-1850 (1850) (Parl. 1850, H. of C. Reports & Papers, 698).

1852/53-1868/69 (1870) (Grt. Brit. Parl. 1870, 469-I).

1870-1878/79 (1880) (Parl. 1880, H. of C. Reports & Papers, 140).

1880-1889 (1890) (Parl. 1890, H. of C. Reports & Papers, ).

1890-1899 (1900) (Parl. 1900, H. of C. Reports & Papers, ).

*General Index* to the reports of select committees:

1801-1852 (1854) (Parl. 1854, H. of C. Accounts & Papers, 32).

- (b) Official Indexes to Parliamentary Papers—House of Lords.

*General Index* to the Sess. Papers printed by order of the House of Lords or presented by special command:

1801-1859 (1860)

1859-1870 (1872)

1871-1885 (1886)

*General Index of the Sess. Papers* printed by order of the House of Lords or presented by Special command:

1801-1859 (1938) (Reprint).

An *Annual Index* was published for each year, 1886-1909.

### 3. Indexes to Digests.

#### a. American.

(1) Key-Numbered Digests. The index book for all key-numbered digests is called a Descriptive Word Index. These word indexes contain several thousand "catchword titles, the extracted salient words from cases, under which references are given to the Topic and Key-Number digests . . . where cases involving or relative to such catchwords are digested." Where the word index, as in the case of the *American Digest System*, consists of more than one unit, each succeeding index unit includes only new catchwords or new developments of the concepts represented by catchwords in former units.

The *American Digest System* has a Descriptive Word Index for the First and Second Decennial, 1896-1916; the Third and Fourth, 1916-1936; Fifth Decennial, 1936-1946; the General Digest, 2d Series; and a paper-bound cumulative supplement containing the most recent materials.

There is an Index in Vol. 50 of the *Century Digest*.

The *National Reporter System* unit digests have a descriptive word index which is supplemented by a cumulative pocket part.

The state digests based on the key-number system of classification each have descriptive word indexes supplemented by cumulative pocket parts.

(2) Other Digests. Nearly all digests are indexed. The indexes vary greatly in form and content.

(3) Selected Case Series Digests.

*L. R. A. Word Index.* This is "a master index to the *Complete L. R. A. Digest* and the *Complete L. R. A. Index to notes* (the Desk Book) which covers all the decisions and annotations in the entire series of the *Lawyers' Reports Annotated*." Since the scheme of classification of the *Complete L. R. A. Digest* is used in the *American Law Reports Digest*, the *L. R. A. Word Index* serves as a key to much of the material in that set.

*Complete Word Index of Annotations in "American Law Reports"* covering Volumes 1-100 of A. L. R. A supplementary volume 4 was issued in 1943, covering Volumes 101-145. The set is kept current by annual pocket parts.

b. English Digests.

(1) General.

*English and Empire Digest.* A comprehensive Index forms Volumes 47 and 48 of the set.

*Mews' Digest of English Case Law.* 2d ed. A Subject Index, 1936-40.

(2) Special.

*English Ruling Cases.* A General Index in Volume 26 and its supplement in Volume 27 serve as a digest for the set.

*British Ruling Cases.* There is a cumulative Index-Digest, covering Volumes 1-10 in Volume 10; and a cumulative Index-Digest, covering Volumes 11-16 in Volume 16.

*All England Law Reports.* There is a cumulative annual Consolidated Table of Cases and Index.

4. Indexes to Annotations.

a. *Complete Index to Notes in the United States Supreme Court Reports, L. Ed.* (*Digest of United States Supreme Court Reports*, Volume 1).

b. Selected Case Series.

Trinity Series.

*List of Important Notes in "American Decisions," "American Reports" and "American State Reports."* This index does not include material in volumes 101-140 of the *"American State Reports."*

*"American Decisions" and "American Reports."* There is a separate Index to Notes in Volume 1 of *Rapalje's Digest*.

*"American State Reports."* There is a separate Index to Notes in Volumes 4 and 5 of *Green's Digest*.

*American and English Annotated Cases.*

Complete Index to Notes in "Annotated Cases," from 1 Ann. Cas. to Ann. Cas. 1918 E.

There is also a separate Index to Notes for Volumes 1-20 in Volume 2 of the *Annotated Cases Digest*.

*American Law Reports.*

*A. L. R. Cumulative Index-Digest* mentioned under Digests above is a combined index to cases and annotations. *Complete Word Index to Annotations*. This index covers Volumes 1-100 in 3 volumes and Volumes 101-145 in a 1943 Supplementary Volume 4. It is kept up by pocket supplements.

*English Ruling Cases.*

General Index in Volumes 26 and 27.

*British Ruling Cases.*

Index-Digest in Volume 10 and the Index-Digest in Volume 16 together form an index to all notes therein.

## c. Special Subject Series.

*Negligence and Compensation Cases, Annotated.*

There is an index to annotations in Volume 2 of the Common-Sense Index.

## d. Case Notes in Legal Periodicals.

Jones and Chipman. *Index to Legal Periodicals*. Vol. 3 (1898-1908) contains a Case Note Index.

American Association of Law Libraries. *Index to Legal Periodicals*. The volumes from 1917 to date contain Case Note Indexes.

## 5. Indexes to Encyclopedias.

*American.*

*Cyclopedia of Law and Procedure* ("Cyc"). Combined Index and Concordance.

*Corpus Juris*. Descriptive-Word Index and Concordance.

*Corpus Juris Secundum*. Fact index arranged by topics in the back of each volume.

*Ruling Case Law*. Index in the back of each volume; a fact index for the whole set in the back of Volume 28; and a Complete R. C. L. Index, in two volumes, which covers volumes 1 to 28 of the original set and volumes 1 to 8 of the Permanent Supplement. Recent material is included in a pocket supplement.

*American Jurisprudence*. Index in the back of each volume.

English.

*Halsbury's Laws of England*. Index in the back of each volume and a General Index in two volumes (Volumes 30 and 31).

*Halsbury's Laws of England, or Hailsham's Edition*. Index in each volume and a General Index, vols. 36-37.

*Encyclopaedia of the Laws of England*. (2d ed., 1906-18). Index in the back of each volume and a General Index in Volume 15.

*Encyclopaedia of the Laws of England*. (3d ed., 1938- ).

*Encyclopaedia of Forms and Precedents* (2d ed., 1925-26). Index in the back of each volume and a General Index in Volume 20.

*Encyclopaedia of Forms and Precedents* (3d ed., 1939- ). Index in the back of each volume.

*Encyclopaedia of Court Forms and Precedents*. (1937- ). Index in the back of each volume.

#### Indexes to Legal Periodical Literature.

Jones and Chipman. *Index to Legal Periodical Literature*.

Vol. 1: 1791-1886, edited by Jones

Vol. 2: 1887-1899, edited by Jones

Vol. 3: 1898-1908, edited by Chipman

Vol. 4: 1908-1922, edited by Chipman

Vol. 5: 1923-1932, edited by Chipman

Vol. 6: 1932-1937, edited by Chipman

All six volumes contain both an Author and a Subject index. In Volumes 1-2 authors' names are followed by page references to the Subject Index. In Volumes 3-5 the authors' names are followed by both titles and citations. Volume 3 (1908-1922) is the only volume which contains a Case Index.

American Association of Law Libraries, *Index to Legal Periodicals*. This set contains an annual volume for each year since 1908. All volumes include Author and Subject Indexes. Volumes from 1917 to date also include Case Indexes. Beginning with the volume for the year 1926 the annual volumes are cumulated once every three years. The index is published in the months of September, November, January, March, May, and July. The November, January, and May issues are cumulative. The July issue is cumulative for the year.

C. C. H. *Legal Periodical Digest*, 1928 to date. This is a loose-leaf service which includes a classified digest of selected articles from leading legal periodicals; and, in addition, a cumulative topical index.

*Current Legal Thought*, 1935 to date. Each number of this periodical includes digests of selected leading articles; a topical index to legal periodicals; and an index to selected legal articles in nonlegal periodicals.

In addition to such standard indexes there are in certain legal periodicals annual indexes of limited scope—e.g., those found in *The American Bar Association Journal*, *The Journal of Air Law*, and the *Tulane Law Review*.

## B. NOTES ON REPORTED CASES

### 1. *Rose's Notes to United States Reports.*

The set was originally issued in twelve volumes in 1901, and a revised edition in twenty volumes, in 1917–1920. These annotations to the decisions of the United States Supreme Court list all the cases in which each decision has been cited by state or Federal courts, and indicate the disposition of the point for which it was cited.

### 2. *Notes to various state reports.*

Notes on Minnesota Reports. These notes were published in 1911 and cover volumes 1 to 100 Minnesota Reports. They "trace out every citation of each Minnesota case by any court of last resort in this country, showing how it has been applied, developed, strengthened, limited, or in any way affected by later decisions that have cited it as a precedent."

Notes of a similar type have been published for California, Illinois, Indiana, Iowa, Nevada, New York, North and South Dakota, Oklahoma, and Texas. The chronological arrangement of these sets has been abandoned by the editors of the notes on the Kentucky and Tennessee reports who have instead arranged the materials in accordance with an alphabetical system of classification.

### 3. *L. R. A. Cases as Authorities.*

This set was published in 1913 in six volumes. It includes references to all subsequent cases in the United States in which any case in volumes 1–70 L. R. A. has been cited or referred to; and also each instance in which any case, reported in the L. R. A. has been cited in any later annotations of *Lawyers' Reports Annotated*, *American State Reports*, *English Ruling Cases*, *British Ruling Cases*, or *United States Supreme Court Reports* through the year 1912. This set also records the affirmance or reversal of any L. R. A. case by the United States Supreme Court. The *L. R. A. Cases as Authorities* were bound in the back of those sets of 1–70 L. R. A. which were issued as an "extra annotated edition"

in 1915. Another such edition was issued in 1923 with supplementary notes bringing the contents to 1922.

4. *Notes to American Decisions and American Reports.*

This twenty volume set records the history of the cases reported in *American Decisions* and *American State Reports* in somewhat the same manner as *L. R. A. Cases as Authorities* collects materials with reference to the cases in *L. R. A.*

5. *Extra-Annotations to English Ruling Cases.*

This two volume set is similar in form and content to its American predecessors. Moreover, it includes both English and American case material.

Anglo-American legal periodicals have for many years contained sections composed of notes on important cases.

### C. TABLES

1. Tables of Statutes: American.

a. Tables of Statutes, etc., construed.

*U. S. Reports* and its advance sheets contains a "Table of Statutes Cited in Opinions" which includes Statutes of U. S., Statutes of States and Territories, Treaties, and Foreign Statutes. The Constitution is covered in the Index under Constitutional Law.

*Lawyers' Edition* and its advance sheets contains a "Table of Statutes, Constitutions, Proclamations, and Treaties Cited and Construed" which includes U. S. Constitution, Acts and Resolutions of Congress, Joint Resolutions, U. S. Revised Statutes, Judicial Code, Criminal Code, U. S. Code, Treaties with Foreign Nations and the Indians, Proclamations and Executive Orders, States, Territories, D. C. and Insular Possessions.

*Supreme Court Reporter* and advance sheets contains a table of "Statutes Construed" including U. S. C. A., Constitution, Statutes at Large, Joint Resolutions, Revised Statutes, Executive Orders, Proclamations, Treaties, Conventions, States.

*Federal Reporter* and *Federal Supplement* have tables of "Statutes Construed."

Most of the recently published volumes of state reports include tables of statutes and constitutional provisions construed in the cases reported. The volumes of the *National Reporter System* and their advance sheets also include tables of statutes construed. And many of the American digests include tables of statutes construed.



b. Tables of Statutes Repealed and Amended.

"Table of Repeals and Amendments of Statutory Provisions" (*Index to Federal Statutes, 1874-1931*).

See also Tables in *U. S. Code, United States Code Annotated, Federal Code Annotated*, and Mason's *United States Code Annotated* and their supplements and pocket parts.

Most compilations of state statutes include Tables of Statutes Repealed, etc.

c. Decisions on the Constitutionality of Legislation.

"Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States." Prepared by W. C. Gilbert of the Legislative Reference Service, Library of Congress. Washington, Govt. Print. Off., 1936. (Reprinted in *Creation of the Federal Judiciary* (Sen. Doc. 91, 75th Cong., 1st sess.)).

"Summary of Major Legislation and of Federal Court Decisions on Its Constitutionality, 73d-76th Congress, 1933-1940." Prepared by W. H. McClenon, of the Legislative Reference Service, Library of Congress. (Sen. Doc. 49, 77th Cong., 1st sess.).

"Summary of Major Legislation and of Federal Court Decisions on Its Constitutionality," First Session of 77th Congress (1941). (Sen. Doc. 203, 77th Cong., 2d sess.).

d. Tables of Statutes by Popular Name.

*Federal Acts cited by Popular Names*, to January 1, 1947. New York, The Frank Shepard Co., 1947. This is kept current by supplements and is periodically revised.

"Official or Popular Names of Statutes, Treaties, and Proclamations," (*Index to Federal Statutes, 1874-1931*).

"Acts by Popular Name" (*U. S. Code*, "Tables and Index" volume, and Supplement).

"Table of Acts cited by Popular Name" (*U. S. C. A.*, Index volume, and Pocket Part).

"Table of Statutes by Popular Names" (*Digest of United States Supreme Court Reports*, Volume I and pocket part).

"Popular Name Acts" (Annual volumes and pamphlet supplements of *United States Code Congressional Service*).

2. Tables of Statutes: English.

a. Tables of Statutes Construed.

"Table of Statutes Judicially Considered" (Mews' *Digest, 1925-1935 Supplement*. Volume 1 and sections

in the *Annual Digest* and cumulative quarterly supplements).

"Statutes, etc." (*All England Law Reports Annotated*, "Consolidated Table of Cases and Index"). This table lists all Statutes and Statutory Rules and Orders which have been dealt with in the reported cases. It is a cumulated list with annual cumulations from 1936 to date, supplemented by similar lists in the bound volumes and advance sheets of the reports.

For the construction of English statutes by the United States Supreme Court, see Volume 1 of *Digest of the United States Supreme Court Reports*, "Table of Statutes, etc., Cited and Construed."

b. Tables of Statutes Repealed.

Chronological Table of all the Statutes (*Chronological Table and Index of the Statutes*. Volume 1). This table is issued annually.

e. Tables of Statutes by Popular Name.

Popular or Short Titles of Statutes (Craies, W. F. *Treatise on Statute Law*, 2d ed., 1911, pp. 607-662).

Table of Short and Popular Titles (Chitty's *Statutes of Practical Utility*, 6th ed., London, 1913, Volume 16). Kept up by Table in annual volumes.

Table of Short and Popular Titles (*Everyday Statutes Annotated*. 1929. Volume 4.) Table of Short Titles is continued to 1931 in Consolidated Supplement.

d. Tables of Statutes in Force.

Index to Statutes in Force (*Chronological Table and Index of the Statutes*. Volume 2). This table is issued annually.

Consolidated Table of Statutes (Halsbury's *Complete Statutes of England*. Volume 21). Kept up by table in Cumulative Supplements.

3. Tables of Cases: American.

a. Tables of Cases Reported and Cited.

Tables of Cases Reported are to be found in nearly all modern volumes of cases—e.g., recent volumes of *United States Reports*—and many volumes or sets have in addition Tables of Cases Cited. Most text books have Tables of Cases Cited.

b. Tables of Cases Digested.

Almost all digests contain a table of cases digested. The Table of Cases of the *American Digest System* consists of:

Table of Cases, Century and First Decennial Digests, 1658-1906. 5 vols.

Table of Cases, Second Decennial, 1907-1916. 1 vol.

Table of Cases, Third Decennial, 1916-1925. 1 vol.

Table of Cases, Fourth Decennial, 1926-36. 1 vol.

Table of Cases, Fifth Decennial. 1936-46. 1 vol.

General Digest, 2d 1936—There is a table of cases digested in each semi-annual volume, and in each monthly supplement.

The Table of Cases for the *American Digest System* purports to list under the names of plaintiffs all cases decided by courts of last resort in America from 1658 to the present date.

c. Tables of Cases, Defendant-Plaintiff.

Many of the newer key-number digests, such as *U. S. Supreme Court Digest*, *Federal Digest*, etc., have tables listing cases under the name of the defendants.

d. Tables of Cases Affirmed, Modified, or Overruled.

In the tables of cases of the *American Digest System* through the Fifth Decennial (1936-1946), the notation after the title of the case indicates the final disposition of that case by the court of last resort. In each bound volume of the *General Digest*, 2d Series, from 1946 to date there is a separate "Table of Cases Affirmed, Modified or Reversed" by decisions digested in that volume. This list is supplemented by a similar Table in the current cumulative Descriptive Word Index Pamphlet.

"Table of Cases Affirmed, Reversed, Reheard, etc. in the Supreme Court of the United States (*Digest of United States Supreme Court Reports*, Vol. 9) continued by similar lists in subsequently published bound volumes and advance sheets of the Lawyers' Ed.

e. Tables of Cases by Popular Name.

"Table of Cases Cited by Popular Name, Federal and State, to January 1, 1941." New York, The Frank Shepard Co., 1941.

"Popular Name Titles." A cumulative list is printed in the front of the "Tables of Cases" of the latest *Decennial Digest*.

"Popular Name Table." A list of Federal cases by popular name is contained in Vol. 72 of the *Federal Digest* and its pocket parts.

"Table of Supreme Court Cases by Popular Name" is found in Volume 15 of *U. S. Supreme Court Digest* (Key-Numbered).

4. Tables of Cases: English.

a. Tables of Cases Reported and Cited.

Almost every volume and set of reports of English cases has a table of cases reported, and some have tables of cases cited as well. English text books, of course, have tables of cases cited.

Consolidated Table of Cases (Halsbury's *Laws of England*, Volume 29).

*All England Law Reports*. A Consolidated Index and Table of Cases, 1936 to date, is issued annually.

- b. Tables of Cases Affirmed, Modified, or Over-ruled.

Index of Cases Judicially Noticed (Talbot and Fort 3d ed., 1927). This index is reprinted as Volume 23 of Mews' *Digest of English Case Law*, 2d ed., 1924 (1927), and is continued through the year 1935 by the section "Table of Cases Affirmed, etc." in the two volume supplement covering 1925-1935, and brought to date by a similar section in Mews' *Annual Digests*.

Cases Followed, Over-ruled, or Specifically Construed (*Law Reports, Digests of Cases*, 1865 to date). This list is brought to date by the Annual Current Index in which the cases are arranged by citation.

List of Cases Affirmed, Reversed, etc. (Butterworth's *Ten Year Digest*, 1898-1907). This list is continued by the similar lists in the *Five Year Digest*, 1908-1912, and in each of the *Annual Digests*.

- c. Tables of Cases Digested.

Consolidated Tables of Cases (*English and Empire Digest*, Volumes 45, 46, and supplement).

Table of Cases (Mews' *Digest* 2d ed., Volume 24 and supplements).

Similar tables are also to be found in the *Law Reports Digest* and Butterworth's *Digest*.

## 5. Tables for American Administrative Material.

*Federal Register*. From March 1936 through June 1938, there was issued a "Related Documents Table" which shows the relation between the various documents which have been published in the daily issues of the *Federal Register*.

*Code of Federal Regulations*. The "Table of Documents Published in the *Federal Register*" published at the end of each Annual Supplement takes the place of the "Related Documents Table" mentioned immediately above.

Much useful material may be found in the *C. C. H. Administrative Procedure Service* and in the Pike & Fischer *Administrative Law Service*.

## D. CITATORS.

### 1. American.

Citation books differ from the Extra-Annotations in that they omit all text. They list the citations to subsequent cases and indicate by means of abbreviations whether or not a case has been affirmed, modified, reversed, overruled, followed, etc. The most comprehensive set in the United States is Shepard's *Citations*.

Shepard's *Citations*. There are two series of units, one covering the officially reported decisions of the Federal and the State courts, and the other the unofficial *National Reporter System*, Federal and sectional reporters. There is a unit of one or more volumes for each state with the exception of Mississippi, and Nevada. There is also a unit of one or more volumes for each of the *National Reporter System* reporters. Each unit is kept up-to-date by a Quarterly Cumulative Supplement, and some few also by intervening Advance Sheets. The material in the Federal and state units is divided into two sections, the one dealing with cases and the other with legislation, court rules, municipal ordinances, etc. It is the purpose of the case section to record the history of every case which has been appealed and every instance in which reported decisions have been cited in subsequent cases. In addition to this information, the citations also contain cross references to the *National Reporter System* and to the cases and notes in the Annotated Reports. Citation to case notes in bar association and other legal periodicals are gradually being added to the various units, thus making them indexes to valuable text material concerning reported cases. In the volumes covering official reports, the material is arranged in two sections, one covering the official citations to the cases and the other the *National Reporter System* citations to the same cases. The former brings out the status of a case in the Federal courts and in its own jurisdiction; the latter the status of the same case in other jurisdictions. The units covering the *National Reporter System* bring out in one section the status of a case in the Federal courts and in the courts of its own and other jurisdictions. In each volume of the *Citations* the material covering the cases is arranged in the numerical order of the volumes of reports, when the volumes are numbered, and in chronological order by reporters, when the early reports were published under the names of the individual reporters. The numbers of the volumes covered on each page are placed in the upper outside corners of the pages. Under each volume of reports included in the *Citations*, the material is arranged in columns. Starting with the first case in each volume, the cases are arranged in these columns in the numerical order of the initial page of each case. The page number is set out in heavy type flanked by heavy dashes. The history of a case is indicated by single letter abbreviations printed immediately in front of the entries for citing cases. These abbreviations are listed and explained in the

front of each volume of the *Citations*. The exact point for which a case is cited is indicated by a small superior figure printed immediately in front of the page number of the citing cases. This number represents the head-note or paragraph of the syllabus which covers the point for which the case is to be used as authority.

It is the purpose of the legislation section of the units covering the official reports to record every instance in which an article or section of a constitution, a section of a code or compilation, a session law, a municipal charter or ordinance, or a rule of court has been "amended, repealed, revised, reenacted, or superseded by a later statute; or extended or limited in its application by a later statute, or added as a new section; or renumbered as a result of renumbering of old sections; or declared to be unconstitutional or invalid." The unit covering the United States records each instance in which any Federal constitutional or statutory provision has been cited, applied or construed in the Federal courts. The state units each carry, in addition to similar treatment of the constitutional and statutory material of its own particular state, a record of all those instances in which the courts of the particular state have cited, applied, or construed a Federal constitutional or statutory provision.

In addition to the case and statutory sections, some units also include a classified topical index built on the key-number classification, and some few a table of cases as well.

*Ash's Table of Federal Citations.* A *Table of Federal Citations*, 1789-1901, compiled by Mark and William Ash, New York, Remick, Schilling and Co., 1901-1902. 4 vols. It shows where each case decided by the United States District Court, Circuit Court, Circuit Court of Appeals and Court of Claims has been subsequently cited in the United States Supreme Court Reports, Federal Reporter, Federal Cases or state reports, and where cases in the state reports have been cited in the Federal reports.

Table of Statutes, Constitutions, Proclamations, and Treaties Cited and Construed (Digest of United States Supreme Court Reports. Volume 1). This table records the citations to those instances in which the United States Supreme Court has cited or construed any of the following: the statutes; constitutions; or treaties or laws of the Indian tribes; the Articles of Confederation; the United States Constitution; the Acts of the Continental Congress; the Acts and Re-

solves of the United States Congress; the United States Revised Statutes; the Judicial Code; the Criminal Code; Treaties with Indians; Proclamations; Statutes of the Confederate States of America; or the constitutions or statutes of any of the states or territories or of the District of Columbia. It is kept up to date by a pocket supplement.

United States Supreme Court cases declaring State laws unconstitutional, 1912-1938. This list was published as Special Report 2 by the State Law Index.

The L. R. A. Green Book. This citator records each instance in which cases from the three series of L. R. A. are cited in the notes to later L. R. A. cases and in the annotations to the first seventy volumes of A. L. R.

*A. L. R. Blue Book of Supplemental Decisions for Annotations in the American Law Reports.* This book may be classified with notes on reported cases since it lists in the order of the volume and page of the annotations in the A. L. R. the titles and citations to later cases, both in A. L. R. and in the state and sectional reports which are in point with the A. L. R. annotations. Recent cases are added in the pocket supplement which is cumulated semi-annually.

## 2. English.

There is no one system of citation material for British reports which is as compact and as comprehensive as Shepard's *Citations*.

Index of Cases Judicially Noticed (Mews' *Digest*, 2d ed., Volume 23 (also published as Talbot and Fort, *Index of Cases Judicially Noticed*, 3d ed.)).

The cases are arranged in alphabetical order, as in a table of cases, and under each case all subsequent cases which contain any judicial comments upon it are listed by title and citation. There is, however, no information with regard to the point for which the case was cited. This index is brought to date by an Index of Cases Affirmed, etc., in the back of the 1925-1935 Digest supplemented by an Index of Cases Affirmed, in the Annual Digests.

Lists of Cases Affirmed, Reversed, etc. (Butterworth's *Ten Year Digest*, 1898-1907, Volume 4). This is supplemented by a list in Volume 1 of the *Five Year Digest*, 1908-1912, and a similar list in each of the *Yearly Digests* from 1913 to date.

Table of Cases Affirmed, etc. (*Law Reports Consolidated Digest*, 1865-1890, Volume 1). This Table is supplemented by similar Tables in the *Decennial Digest*, 1891-1900; in the *Ten Year Digest*, 1911-1920, Volume 1; in the *Ten Year*

*Digest*, 1921-1930, Volume 1; in the *Current Indexes*, 1931 to date; and in the *Quarterly Cumulative Supplement*.

*English and Empire Digest*. The citation material in this digest is in the form of "Annotations" placed at the end of the digest case entries. Each of the citing cases is accompanied by an abbreviation which shows whether the original case was followed, approved, etc. These abbreviations are listed and explained in the front of each digest volume. This system of citation is the only one which brings out the specific point for which the cases are cited.

Massachusetts Citations, Table of English Cases Construed or cited by the Supreme Judicial Court of Massachusetts (1882-1915), by Edward Harry Redstone. Boston, Eugene W. Hildreth, 1915.



## CHAPTER IX

### HOW TO USE LAW BOOKS

**Introductory.** The problem of determining what law is applicable to a given factual situation is really the problem of predicting what the appropriate tribunal will declare to be the rights, duties, or other legal relations incident to those facts. Such a prediction must in large part be based on the material found in law books. Where valid legislative enactments exist, they will control. If no controlling legislative provision can be found, the search must be extended to judicial and administrative material. In this connection it is well to remember that the common law of the United States and of the British Commonwealth of Nations is largely a law of judicial precedents. Therefore, of all primary authorities, the reported decisions of judicial tribunals are the most important, for among them are found not only decisions in regard to the constitutionality of legislative enactments and the interpretations and applications which the courts and administrative tribunals have made of them, but also the rules of law governing matters not covered by specific constitutional, legislative, or administrative provisions.

The purpose of this chapter is to furnish a plan for using law books by which lawyer and law student may make a thorough, systematic search of the sources for material upon a given problem with a minimum of effort. Execution of such a plan requires a careful record of each step in the process, a knowledge of the several methods of approach, and an accurate knowledge and analysis of the facts of a problem.

**Records of Research.** A step by step record of the search should be kept. Although this may be as brief as is consistent with intelligibility, it should contain not only a list of the sources which have yielded material but also a record of those which have proved barren. The entries should show the names of the works consulted, the volumes, the topics, the section, etc., with notations as to whether or not the material was of any value. This record

should be kept, separate from all other papers relating to the work in hand. It will provide an excellent means for rediscovering in a minimum of time, and with a minimum of effort, the whole, or any part, of the work should papers be lost or mislaid. In such an instance it will eliminate the possibility of repeating abortive steps and will bring to mind again the valuable "hunches" which otherwise might never be recaptured. In all events, the record will provide an easy and efficient method of making a hasty review to check the thoroughness of the search.

Separate records should be kept of statute, case, and text material. These records may be kept on cards which can be distinguished by differences in color or size. One card, hereinafter referred to as a "statute card," should be used to record each pertinent statutory provision. In addition to the title, citation, and text of the provision, a note of its history, constitutionality, and interpretation should be made. Another card, hereinafter referred to as a "case card," should be used to record each case. In addition to the title, citations, and date, notes should be made of the headnote number (taken from the official report or *National Reporter System* report) of the point for which the case is to be used as authority, the judicial history of the case as found in *Shepard's Citations*, and an abstract of the case, if it is in point and still good law. These case cards should be filed alphabetically. A third card, hereinafter referred to as a "text card," should be used for statements taken from treatises, encyclopaedias, legal periodicals, etc. If the statements are expressions of opinions with regard to statutes or cases in point, the text cards may be filed with the statutory or case cards covering the statute or case commented upon.

**Methods of Approach.** Research on a legal problem may be begun in any of three ways: (1) by means of words or phrases descriptive of the facts involved; (2) by means of topics deduced from a study of the facts; or (3) by means of the citations to legislation or cases obtained through a preliminary examination of dictionaries, treatises, encyclopaedias, restatements, and the like. The second and third methods are closely related; the third is often impossible without at least a preliminary use of the second.

The selection of an approach is determined by the information in hand. Therefore, no one method is used exclusively in working up any problem. A change may be made from one method to another as often as the possibilities of one are exhausted or the key material for the other is acquired. It might be well to point out early in the discussion that the "word" or "fact" approach is generally the most productive in the early stages of research, because it may be employed long before any very definite idea of the scope of the problem and its solution has been acquired, but that the citation approach is more efficient as soon as the searcher understands the general problem and has found a precedent on all fours or on analogous facts.

**Prerequisites of Search.** The facts must be mastered at the very outset. A failure to master the facts is a basic error which renders abortive any further attempt to deal with the problem. Through careful analysis the essential facts may be abstracted from the mass of detail. These facts should be stated in legal language and arranged in chronological or, where advisable, in logical order. It is not necessary that the legal implications of each fact be fully realized at this point. All that is needed is a recognition of their general character in order that reference may be had to the proper categories of the law from which to draw the rules which govern them.

Any definitions which are essential to the solution of the problem, as well as the legal import of the words and phrases in any documents involved, should be ascertained through the use of legal dictionaries, the treatment of words and phrases in statutory compilations, encyclopedias, digests, and sets such as *Judicial and Statutory Definitions of Words and Phrases*, while bearing in mind that definitions vary with the facts before the court in a specific case and are not, therefore, universally valid. Since definitions in these works are generally accompanied by citations to the sources from which they were gleaned, this step may result in the discovery of citations to statutes or cases in point. These citations, if applicable, will form the basis of the citation approach. Each citation should be noted on a separate statute or case card.

**Word List Approach.** The problem suggested by the facts should be analyzed for words and phrases descriptive of the

salient facts which may be used as starting points in the search for authorities. This analysis should cover such points as:

1. The Cause of Action. What rights were violated or duties unfulfilled in the eyes of the law? What defense is offered?
2. The Parties.
  - (a) Are they members of some "class" protected by or subject to special rules of law, e.g., infants, married women, insane persons, spendthrifts, corporations, etc.?
  - (b) What "relation" is there between them which might affect their legal rights and duties with regard to one another, e.g., principal and agent, master and servant, carrier and passenger, etc.?
  - (c) Is either party a member of some "occupational group" or "profession" specially treated by the law, e.g., innkeepers, attorneys, doctors, etc.?
3. The Subject Matter. What place or thing is the subject matter of the action, e.g., ticket, snow, land, etc.?
4. The Object of the Action. What relief is sought, e.g., damages for some injury suffered; an injunction against a threatened course of action; a new trial; etc.?
5. Other Points in Issue. What particular point of law or procedure is in issue other than the cause of action, e.g., contributory negligence, a rule of evidence, etc.?

After words and phrases descriptive of those aspects of the problem which might be changed without affecting the legal set-up have been eliminated, the remaining words and phrases will constitute a list which can serve as a basis for the word or fact approach. This list will hereinafter be referred to as the "word list."

**Approach by Topic or Citation.** To provide a basis for the topic approach, the question "Under what heading or topic of law will the problem fall?" must be answered. In choosing topics it is better to choose specific rather than general ones, e.g., for contracts for work and labor, see "Work and Labor" and not "Contracts." It is here that a knowledge of law and familiarity with the topics or main headings is an invaluable aid.

If the legal setting of the problem is not quite clear at this point, it may be well to consult secondary sources such as *Restatements*, encyclopedias, treatises, and the like. If *Restate-*

*ments* are used, the generalized statements of the law found in them should be supplemented by reference to the volumes of state annotations and the "Restatement in the Courts" for citations to specific cases in point. In using encyclopedias, the search should not be deemed complete until the supplementary volumes and pocket parts have been examined. The use of this secondary material may be as limited or as extended as one cares to make it. Since it is well to begin work with the primary authorities—i.e., legislation and cases—as soon as possible, the use of secondary material can be cut short as soon as either the general legal problem is understood or it is realized that the point under investigation is so minute that further search in this material will result in a waste of time. In addition to providing a basis for a more intelligent analysis of the facts and a clearer understanding of the topic under which it falls, an examination of secondary sources may, if successful, disclose citations to statutes or cases which will be of use in the citation approach. Each citation should be listed on a separate case or statute card, and each quotation from the text on a text card.

**Routine of Search—General.** It is assumed at this point that sufficient use has been made of dictionaries, statutory and judicial definitions of words and phrases, and such secondary material as restatements, encyclopaedias, and treatises to guarantee an understanding of the problem involved and to furnish an index list of descriptive words and phrases, and a list of citations to pertinent legislative, administrative, and judicial material—the necessary prerequisites for any intelligent and efficient research. For purposes of efficiency, a definite routine should be kept in mind throughout the search but varied in accordance with the material found. This general routine will vary only slightly when the search is extended beyond the legislative and into the administrative or judicial material. However, as there can be no tailor-made pattern, it is not to be assumed that any formula, routine or pattern may be employed which will work efficiently with relation to all fact situations. Research in the books is a technique, just as law is an art. An orderly method is all that it is meant to suggest here.

**Legislative Material.** Search almost always begins with the use of some key to the materials involved. If the word or fact

approach is adopted, the key will be a word index; if the statute citation approach is selected, a table of statutes; or, if the topic approach is chosen, an analysis of a particular title or chapter. Generally, whichever approach is chosen, it will lead to those provisions of the legislation which pertain to the question in hand. These provisions should then be read, if possible in an annotated edition, and should be analyzed.

Before, however, any elaborate notes are made on the sections of the legislation which at first glance seem to be in point, their status should be checked in the proper unit of Shepard's *Citations*. This precaution will conserve time which might otherwise be wasted in examining provisions which have been amended, repealed, or revised. If the provision has been changed in any manner, notes of such changes should be made on the statute heard, and the new provisions substituted for the old during the remainder of the search. If the provision is constitutional, the next step is to check its interpretation by the courts. If it is statutory the next step is to check its constitutionality.

First the provision should be checked in the proper state or Federal unit of Shepard's *Citations* and in the Table of Statutes, etc., Construed, in Volume 1 of the *Digest of United States Supreme Court Reports* and its pocket supplement in order to ascertain whether or not the courts have at any time passed upon the question of its constitutionality. State statutes should be checked in annotated editions with emphasis on the pocket or other supplements and in the Table of Statutes Construed in the volumes of the decisions of the highest state court issued subsequent to the pocket parts. If the constitutionality of the provisions has not been passed upon, it may perhaps be necessary as in the case of a recently enacted statute, to attempt to forecast the stand which the courts might take on the particular provision should its validity be questioned. The second step, therefore, should be a check of analogous statutory provisions to see what attitude the courts have taken upon the question of their constitutionality. Shepard's *Citations* must again be consulted just as in the first step. If the courts have not been called upon to pass on the constitutionality either of the particular provision under consideration or of any analogous statutes, then recourse may be had to the technical rules of statutory interpretation. Among other things that may be examined are the legislative history of the statute including pertinent reports of legislative

committees of legislative hearings, amendments proposed and adopted or rejected in the course of its passage, and even debates in the legislature. Once a construction has been placed upon a provision in question, it is easier to make a tentative forecast as to whether or not it is too broad in terms to come under the power granted to the legislature by the constitution. Similarly an examination of other legislation on the subject existing at the time of its enactment will furnish a basis for a prediction on the related question of whether or not it is repugnant.

The application of the statute to the particular matter in hand must next be determined. A check in Shepard's *Citations* will reveal whether or not the courts have ever interpreted or applied the act. If they have, citations will be listed for those cases in which the court has done so. The citations should be noted on Case Cards and checked in Shepard's to see whether or not they have been modified, reversed, criticized, questioned, or overruled. Those in good standing should be abstracted.

**British Statutes.** The investigation of problems in English legislation involves a somewhat different technique. In the first place there is no "written" constitution. There are, however, the so-called conventions of the English constitution. Adequate explanations of these conventions may be found in the various texts on British constitutional law, such as, Anson or Dicey. In general, however, they are of political rather than legal interest. Where the point in question is not covered by one of these conventions, the search must be extended to the enactments of Parliament and subordinate bodies:

The fact that the courts cannot question the validity of an Act of Parliament limits any need for a test of constitutionality of delegated legislation. Therefore, the next step usually consists of determining the construction of the enactment. Here again British technique differs from the American. Courts are restricted in construing a statute to a consideration of the law before the statute, the "mischief" which it was meant to remedy, and the words of the statute itself. They are not permitted, as are the American courts, to consider the statements of the sponsors of the bill, the committee reports, statements made at committee hearings, statements made in the course of debates in Parliament, or the other elements in the legislative history of the

Act. While, however, these materials are not admissible in the English courts, they are often an aid to American lawyers and students in their study of specific English legislation. The official rules for the construction of British statutes are to be found in The Interpretation Act, 1889 (52 & 53 Vict. c. 63), and amendments to it. Commentaries on them will be found in Craies' (4 ed.) and Maxwell's (8 ed.) works.

**Use of Specific Material—General.** In the United States the federal constitution must be examined first. If the facts cannot be brought under an article or section of the constitution, the search must then be extended to federal statutes and delegated legislation, or, in rare cases, to treaties and cases interpreting them. Since only a limited number of fact situations fall within the field of federal control, most probably the search will have to be carried into state or municipal materials. When the question is one of state or municipal law, the state constitution should be examined first in the same manner as that suggested for instances in which the federal constitution is controlling. If no applicable provision is found, a search for state statutes and delegated legislation should then be made. The constitutionality of any applicable enactments disclosed by this search should then be checked in the light of both the federal and the state constitutions. The procedure to be followed in interpreting what is deemed to be a valid state statute is the same as that suggested for instances in which a federal statute is in question.

**United States Constitution.** If there is an article or section of the federal constitution applicable to a given problem, the task is not only one of finding that article or section but also one of ascertaining the manner in which it has been, or might be, interpreted by the courts. Both purposes may be most easily accomplished if recourse is had to an annotated edition of the constitution.

*Finding Articles or Sections.* Fairly adequate indexes are available, but the document itself is so brief that, even without an index, applicable articles and sections, if any, may usually be found with a minimum of difficulty. The index list of descriptive words and phrases affords leads for this step. Applicable articles or sections should be added to the index word list.



*Judicial Interpretation of Articles or Sections.* The notes of decisions, or annotations, following the text of the specific and related provisions should then be read. If the search is being made in the *United States Code Annotated*, in the *Federal Code Annotated*, or in Mason's *U. S. Code*, the pocket supplement should not be overlooked. Notes should be made upon separate case cards of the names and citations of all cases in point, with brief memoranda of the exact issues in controversy. To prevent duplication these cards should be arranged in alphabetical order for comparison with citations found later in the search. The citations to federal cases found in this manner should be compared with those listed under the same article or section in *Shepard's United States Citations* (all bound volumes and supplements); and Table of Statutes, Constitutions, Proclamations, and Treaties Cited and Construed (*Digest of United States Supreme Court Reports*, Volume 1 and pocket supplement). The citations to cases in a particular jurisdiction may be compared with those found listed under the same article or section in that part of *Shepard's Citations* unit for the particular state which deals with the treatment of the federal constitution in the courts of that state. Any additional citations secured in this way should be noted on case cards.

*Legislative History of Articles or Sections.* A thorough search may include an examination of the historical and editorial notes, if any, which follow the text of the article or section, in any annotated editions, supplemented, when necessary, by an investigation of such documents as *Accounts of the Debates in the Federal Constitutional Convention*; *Accounts of the Debates in the State Conventions called to ratify the Federal Constitution*; the writings of the founding fathers, e.g., Madison, Hamilton, Jefferson, and others; earlier documents and organic laws, e.g., the *Declaration of Independence*, the *Articles of Confederation*, and the *Ordinance of 1787*. Material found in the above sources should be noted on separate text cards.

The procedure just outlined should bring to light nearly all the judicial decisions wherein the specific article or section under consideration has been authoritatively interpreted, or even merely alluded to, up to the time of publication of the respective works consulted. In addition, it will yield a historical record of the interpretation placed upon the article or section by its spon-

sors and of its development during its progress through the convention. An exhaustive search, however, will not end here. Since judicial decisions often disclose applicable constitutional provisions which might otherwise be overlooked, it will include the further steps outlined below for a search for judicial precedents and lesser authorities.

**Acts of Congress.** Because our federal government is one of delegated powers, the fields within which it may act can be ascertained by an examination of the Constitution. However, the generalized form of the constitution is such that an examination of it will hardly serve to indicate the existence of the multitude of social laws which have been passed purportedly under the broadly phrased powers enumerated therein. Today, at every session of Congress, numerous so-called positive laws are passed the incidents of which are felt in all phases of our national activity. Therefore, in view of the steadily widening sphere of federal regulation, a careful survey of federal statutory materials must be made by means of indexes, topical analyses, and citation books, before it can safely be assumed that Congress has not acted. The method of research will depend on whether or not the enactment sought is (1) one of more than one year's standing; (2) a recent enactment; or (3) pending legislation.

*Enactments of More Than One Year's Standing.*

Finding enactments. Each of the current publications of federal statutes is provided with a modified descriptive word index. There is also the combination index composed of the *Index-Analysis of the Federal Statutes, 1789-1873*, and the *Index to the Federal Statutes, 1874-1931*, and the earlier *Synoptical Index to the Laws and Treaties of the United States of America from March 4, 1789 to March 3, 1851* (5 ed., 1860). These indexes include legislation of any but a recent date. Indexes generally vary in both completeness and accuracy. Their value varies with the compiler's ability to choose logical words of classification and the extent to which cross-references are added. It is, therefore, well to spend some time considering various words and phrases under which the matter might be listed. The Word List will prove of some value here.

Constitutionality of enactments. *Shepard's, United States Citations* with its quarterly supplements and advance sheets; the Table of Statutes, etc. Construed in Volume 1 of the *Digest of United States Supreme Court Reports*, and its pocket supplement; and the Tables of Statutes Construed in the bound volumes and advance sheets of the *U. S. Reports*, *U. S. Supreme Court Reports*, *L. Ed.*, and *Supreme Court Reporter* which may have been published since the last supplement to *Shepard* or the *Digest of United States Supreme Court Reports*, should be checked to determine whether or not the courts have passed upon the constitutionality of the specific provision or of any related or analogous provision.

Judicial interpretation of enactments. To determine the meaning of the provision, the interpretation placed upon it by the courts should next be investigated. The statute should, if possible, be examined in an annotated edition, in order to make use of the notes of decisions listed there. Both the *United States Code Annotated* and the *Federal Code Annotated* cite state as well as Federal cases. Case cards should be made for the cases thought to be in point.

Citations found in this manner should be compared with those found in the *Shepard's Citations*, *United States and Federal*, and with the Table of Statutes, etc. Construed (*Digest of United States Supreme Court Reports*, Volume 1 and pocket supplement). These may be supplemented with the Table of Statutes Construed in subsequent bound volumes and advance sheets of the various editions of the *Supreme Court Reports*, and of the *Federal Reporter* and *Federal Supplement*.

Additional citations obtained in this manner should be recorded on case cards, and the cases read.

Legislative history of enactments. For the construction of statutes which are ambiguous in meaning, it is advisable to test any textual interpretation by comparison with statements of intent found in the documents which make up the legislative history of the enactment. Valuable leads to this material may be obtained from the historical and editorial notes in the annotated editions, from material in the *U. S. Code Congressional Service*, and from the various loose-leaf services.

Before going further, it might be well to outline the stages in the legislative history of an Act of Congress.

1. A bill is introduced in either House where it is given a number by which it is cited during that Congress until it becomes law. If introduced in the House, the number is preceded by "H. R.," if in the Senate, by "S." Copies of a bill in its various stages may be obtained from the House or Senate Document Rooms in the Capitol.

2. The bill is then referred to the appropriate committee of the House in which it was introduced. It may "die in committee" either for lack of consideration or because of unfavorable action. Or it may be "reported out." During its consideration by the committee, hearings may be held to give the committee the benefit of the views of experts and of interested parties. These hearings may be public or closed. Printed reports of hearings may usually be purchased from the Superintendent of Documents.

3. If the committee decides to "report the bill out," it introduces either the original bill or an amended print with its report. Copies of the preliminary and final reports may usually be obtained from the committees or from the House or Senate Document Rooms.

4. The bill is then debated on the floor, and the debate is recorded in the *Congressional Record*.

5. If passed, a copy of the bill (now designated "Act"), as passed, is then sent to the other House where it goes through the same stages.

6. If the Act is passed with amendments by the second House, then it must be returned to the House of its origin. If the latter refuses to accept the amended form, a conference committee is appointed from the members of both Houses.

7. If the conference committee can reach an agreement, it reports the Act to both Houses. Copies of the House and/or Senate conference report, if printed, may be obtained from the committee or from the Senate or House Document Room.

8. If the measure is passed after debate (which is recorded in the *Congressional Record*) it is enrolled and forwarded to the President for approval. It becomes law if signed by the President or if not returned to the House of its origin within ten days. It fails to become law, if the President returns it with his veto or if the adjournment of Congress prevents the President's returning it with his signature within the ten day period. The

action of the President in the latter case is referred to popularly as the "pocket veto." (For a full treatment of this subject see "Enactment of a Law: Procedure on a Senate Bill." S. Doc. 155, 73d Cong., 2d sess.)

Committee Reports—Senate and House (cited: S. or H. Rept. 1011, 78th Cong., 2d sess. (1944)). When they can be obtained in printed form, these reports are a most important and authoritative source of information concerning the intent of the legislature in passing the law. Very often they contain copies of briefs and other papers not otherwise accessible. The existence of printed committee reports, can be ascertained by using as a key the bill number which may be obtained from the Slip Law, the *Statutes at Large*, the *House Calendar*, or the biennial *Document Catalog*. With this key, the number of any Senate or House committee report may be found in the History of Bills numerically arranged in the index volumes of the *Congressional Record*, also in the *House* and *Senate Journals*, or the final edition of the *House Calendar*.

Committee Reports, including supplemental and conference reports, are listed by committee or subject matter in the Index to the *Congressional Record*, the *Monthly Catalog*, the biennial *Document Catalog*, and the *Check List* (3d ed., 1911) prior to 1909; they are also listed by bill number in the History of Bills previously referred to and in the *Numerical List of Reports and Documents* published at the end of each session of Congress.

Committee Hearings—Senate and House (cited: Hearings before the Committee on Military Affairs of the Senate (or House of Representatives) on S. (or H.R.) 4000, 78th Cong., 2d sess. (1944)). The printed hearings are almost as informative as the committee reports, although not equally as authoritative. In them may be found such material as communications to the committee from administrative officers, briefs submitted by interested parties, and other data useful in reconstructing the problem which Congress intended to solve by the proposed enactment. Not all reports of hearings have been printed, in fact, comparatively few such will be found prior to 1920. The existence of printed committee hearings may be discovered by obtaining the bill number from the Slip Law, the *Statutes at Large*, or the final edition of the *House Calendar*. With the bill number as a key, the title of the bill, the name of the committee before which

hearings were held, the title of the printed hearings, and the document number, if any, can be secured in the *Index of Congressional Hearings . . . prior to March 4, 1935, in the United States Senate Library*, and its 1939 supplement; the *Index of Congressional Committee Hearings prior to Jan. 3, 1939 in the Library of the House of Representatives*; the biennial *Document Catalog*; or the annual index to the *Monthly Catalog*. Reports of early hearings, some of which were printed as reports or documents, are listed under individual committees in the *Check List of United States Public Documents*.

**Debates in Congress.** As a general rule, reports of legislative debates are of comparatively less importance than either Committee Reports or Committee Hearings. These accounts, however, very often contain, in the remarks of committee chairmen and members introducing reports, information, consciously offered to make a record of legislative intent, which is printed nowhere else. For this reason they are often of use to courts and lawyers in determining the meaning of ambiguous provisions. In using them, it should not be forgotten that the reports found in the *Annals of Congress* and in the *Register of Debates* are no more than abstracts of the proceedings. The reports in the *Congressional Globe*, on the other hand, vary in form from mere abstracts in the early volumes to the more complete records of the proceedings published in the later volumes.

**Bills.** Though copies of bills are not available in most libraries, an examination of the original bill and of the bill in its amended form is advisable whenever possible.

The history of the legislative action taken on any bill may be found by tracing its bill number in the numerical index of the *Congressional Record* or of the *House and Senate Journals*. It may also be found by means of the subject index of the *Calendar of the United States House of Representatives and History of Legislation*, and, since 1936, in the *Digest of Public General Bills*.

#### *Recent enactments.*

**Finding recent enactments.** Recent enactments may be discovered by means of the *Digest of Public General Bills*, the *United States Code Congressional Service*, the *C. C. H. Congressional Index Service*, the *House Calendar*, the *Monthly Catalog*, and the semi-monthly *List*. The text of the enactments

may be read in the Slip Laws, the *U. S. Code Congressional Service*, etc.

Judicial interpretation of enactments. There are, of course, few cases interpreting very recent legislation. What few there are may be found by consulting the notes to the act in the *United States Code Annotated* Cumulative Pamphlet Supplement if any and in *Shepard's United States Citations* cumulative supplement and advance sheets. The advance sheets for the *U. S. Reports*, *U. S. Supreme Court Reports*, *L. Ed.*, *Supreme Court Reporter*, *Federal Reporter*, *Second Series*, and the *Federal Supplement* each contain a table of Statutes Construed, which is useful in tracing the judicial history of the very latest enactments. These tables are cumulated in the bound volumes of the respective series.

Legislative history of enactments. If an enactment is ambiguous, recourse must be had to the usual aids to interpretation, i. e., committee reports, committee hearings, reports of debates in Congress, and copies of bills. A record of the action taken on any enactment can be found in the *Digest of Public General Bills*, the *House Calendar*, and the *C. C. H. Congressional Index Service*. From this information the existence of any printed reports or hearings and the dates under which to search for debates in the *Congressional Record* may be ascertained.

#### *Pending Legislation.*

Finding pending legislation. The existence of bills under consideration in either the House or the Senate may be ascertained by means of the *House Calendar*, the *Digest of Public General Bills*, *U. S. Code Congressional Service*, or the *C. C. H. Congressional Index Service*. The latter three services contain the gist of the bill as well as its number.

Legislative history of pending legislation. The action taken on pending legislation is recorded in the *Digest of Public General Bills*, the *C. C. H. Congressional Index Service*, the *House Calendar*, and the *Congressional Record* bi-weekly index. Hearings or reports already in print, as well as the citations to the records of debates in Congress can be discovered by means of these publications.

Bills which have failed to become law. The *Calendar of the United States House of Representatives and History of Legisla-*

tion contains a list of all bills which have been acted upon in one or both Houses but failed to become law, also a list of bills killed by the President's "pocket veto." The index to the bound edition of the *Congressional Record* includes a list of bills vetoed and returned to Congress. The legislative history of such bills is recorded in the same publications as that of bills which became law.

In order that the search may be complete it must be extended into the most recent materials. For this purpose the loose-leaf services should be consulted. These services cover special categories of the law and are kept up to date by the regular issuance of new materials at short intervals, often each week.

It is essential that the investigation next be rounded out by a search for judicial precedents and lesser authorities. The indexes to judicial materials usually include a greater proportion of fact words and this search will serve as another way to discover legislation because it will often lead to cases specifically citing applicable provisions. Recourse may be had to parallel Reference Tables to trace citations to older compilations, revisions and codes into provisions of compilations presently in force.

When the initial information consists of a popular name for an act, it can be changed to a regular citation by means of the Table of Acts cited by Popular Name to be found in Volume 9 of the *Digest of the United States Supreme Court Reports* and its pocket supplement, and in Shepard's *Federal Acts by Popular Name*, as well as in similar tables in the *U. S. Code*, *U. S. Code Annotated*, and *U. S. Code Congressional Service*.

In searching for temporary, local, and special acts, the Table in the *Federal Code Annotated* is of some assistance in determining the nature of the act, etc.

Both the *Federal Code Annotated* and Mason's *U. S. Code* include annotations on "uncodified laws."

**Treaties.** The federal constitution provides in article VI, section 2, that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." Problems involving treaties are, however, comparatively rare.



*Finding Treaties.* Treaties are listed by subject matter in the *Subject Index of the Treaty Series, etc.* (which is also to be found in the short print of Volume I of Hunter Miller's *Treaties and Other International Acts*), also in the *Index to Federal Statutes, 1874-1931*. Other indexes listed in the bibliographical section above under Key Material are arranged by country or by date. Collections on special subjects such as Flournoy and Hudson's *Nationality Laws, etc.* provide an easy means of locating treaties on special subjects.

*Interpretation and Construction.* The Attorney General has from time to time been asked for an advisory interpretation of treaty provisions. These may be found by means of Cadwalader's *Digest* (1877), and the other digests of the *Opinions of the Attorney General* listed above. Interpretations by the court may be discovered by means of an examination of the annotations in the *Federal Code Annotated*, Volume 12 and its pocket supplement. The notes therein include citations to both Federal and state reports. Another source of citations is the Table of Statutes, Constitutions, Proclamations, and Treaties Cited and Construed (*Digest of United States Supreme Court Reports*, Volume 1 and pocket supplement). Both of these may be brought to date by means of the tables in the volumes of the various editions of the Supreme Court Reports and the *Federal Reporter* and *Federal Supplement* which have been published subsequently. Treaties are listed in Shepard's *Citations* as parts of the *Statutes at Large*. Interpretations by the courts may also be discovered by means of digests of International Law such as Moore's (1906) and Hackworth's (1944), and digests of international arbitrations such as Moore's (1898 and 1929). Treatises listed under secondary sources above are also useful.

*Legislative History.* For material on the construction of provisions which have not yet been interpreted by the courts historical material such as is found in the following works may prove useful: *Foreign Relations, Journals of the Executive Proceedings of the Senate of the United States, Senate Executive Reports, Reports of the Committee on Foreign Relations, and Senate Executive Documents*, as well as secondary authorities listed above.

*Interpretations by International Tribunals.* It may often prove enlightening to investigate the interpretation placed upon

treaty provisions by the World Court and the Permanent Court of International Justice.

**State Constitutions.** State jurisdiction in those fields of control not delegated to the federal government is always derived from the state constitution.

*Finding Articles or Sections.* In searching for applicable articles and sections, annotated editions should be used whenever possible. The method of search should be similar to that outlined above for the federal constitution.

*Judicial Interpretations of Articles or Sections.* The notes of decisions following the text of the specific or related provisions should be read, and citations to cases interpreting the article or section in question should be noted on case cards. These citations should then be compared with those listed under the same article or section in *Shepard's Citations* for the particular state (bound volumes and supplements); and Table of Statutes, Constitutions, etc., Cited and Construed (*Digest of United States Supreme Court Reports*, Volume 1 and pocket supplement, and subsequent bound volumes and advance sheets of the various editions of U. S. Supreme Court Reports, and the *Federal Reporter* and *Federal Supplement* as well as the State Reports.

Any additional citations which are found in this way should be noted on case cards, and all cases read.

*Legislative History of Articles or Sections.* The material obtained from historical and editorial notes may be supplemented through an examination of the *Journals* and *Debates* of the Convention at which the constitution was drawn up; the texts of earlier constitutions in conjunction with the *Journals* and *Debates* of the conventions which prepared them; and early charters and organic acts in force before the admission of the state to the Union. It might even prove worth while to compare the applicable article or section with similar provisions in the constitutions of other states. This may be done by means of *Provisions of the Various State Constitutions* (1907); *Index-Digest of State Constitutions* (1915); or *Reports of the Constitutional Convention Committee*, Volume 3 (New York), (1938).

Since elaborate annotations to state constitutions comparable to those made to the federal constitution are seldom available, it is essential that the search for judicial precedents and lesser authorities be continued independently of the annotations.

**State Statutes.** Within the limits laid down by the federal and state constitutions, the legislatures of the several states have promulgated a steadily growing number of statute laws. In some states the volume of such legislation is greater than that passed by the national Congress. The problem of finding whether or not there is an applicable provision in this amorphous mass of material can be solved in much the same way as the problem of finding federal legislation.

*Finding Enactments.* If a check list of words and phrases is chosen as a key, the indexes to the various statute books are the proper starting points. For this purpose the sections dealing with "Construction of Words," "Definitions," "Interpretation of Words," or "Words and Phrases," and the set *Words and Phrases*, with its pocket parts, will also prove helpful. If, on the other hand, the topic approach is selected, the Tables of Contents and detailed topical analyses of the various publications may be used to find the applicable legislative provisions. However, a search in the fact word indexes of judicial material will often result in the discovery of a case which involves a statute or an ordinance and cites it specifically. Because such indexes most often include more fact words, it will be well to refer to them early in the search. Should a citation to a specific provision have been obtained from some independent source, it may be necessary to translate it into a reference to the publication in hand by means of the Parallel Reference Tables or the Table of Statutes by Popular Names which are included in some statute books.

Once a pertinent enactment is found, the procedure from that point on should not differ from that used in working with federal legislation. An annotated text should be used wherever possible. Since, however, annotated editions are generally private editions and only *prima facie* evidence of the law, the text found must always be verified by a comparison of it with the official session laws.

*Constitutionality of Enactments.* The constitutionality of the enactment must be tested not only with regard to the state constitution but also with regard to the federal constitution. The citation should be checked first of all in *Shepard's Citations* for the particular state (bound volumes, supplements, and advance sheets). *Shepard's* includes session laws as well as revisions, compilations, and codes, and it contains not only citations to

decisions interpreting particular provisions but also the history of those provisions, i.e., citations to any later amendments, repeal, or revision of the enactment. Use should also be made of the Table of Cases cited in the State Reports and subsequent volumes and advance sheets of the proper unit of the *National Reporter System*, also of the Table of Statutes Construed (*Digest of United States Supreme Court Reports*, vol. 1), and the Table of Cases cited, etc., in subsequent bound volumes and advance parts of *U. S. Reports*, *U. S. Supreme Court Reports*, *L. Ed.*, *Supreme Court Reporter*, *Federal 2d*, and *Federal Supplement*, and of loose-leaf services covering state laws on the subject.

*Judicial Interpretations of Enactments.* Whether or not an annotated compilation with its supplements, a volume of session laws, a slip law, or a loose-leaf service such as the *C. C. H. Advance Session Laws Service* is the end of a successful quest, the interpretation by the courts of any applicable enactment should be ascertained by means of the information gathered from the sources mentioned under "Constitutionality" immediately above.

*Legislative History of Enactments.* As in the case of federal legislation, when the applicable enactment has not been interpreted by the courts, it may be necessary to attempt to determine in advance the construction that will be given to it. In addition to applying the local rules of statutory construction, it may be advisable to consult available documentary material. Certain difficulties will arise in searching for such material. First the *Monthly Checklist of State Publications* lists only those publications received by the Library of Congress. Second, there are no publications equivalent to the *Congressional Record* reporting the debates in state legislatures. Third, committee reports and hearings are not as a rule published. Finally, with few exceptions, there are no publications generally available which are equivalent to the *House Calendar*. It will be necessary, therefore, to rely on such sources as the *C. C. H. Legislative Reporting Service* for a record of the progress of bills pending in the legislature. Recourse may also be had to sets of the State Senate and House *Journals* for this purpose whenever they are available.

When no cases can be found interpreting the particular statute or when the cases found are not on similar facts, it is frequently profitable in forecasting the reaction of the court to

survey the treatment given by the courts of other states to identical or similar statutory provisions. For this purpose *Words and Phrases* with its pocket supplements may be used to find similar or identical statutory provisions with aid from the Word Lists. Provisions found in this way may then be checked in the Table of Statutes, etc., Construed (*Digest of U. S. Supreme Court Reports*), *U. S. L. Ed.*, *Supreme Court Reporter*, *Federal 2d*, and *Federal Supp.*, also in the *Shepard's Citations* for the particular states or for the proper units of the *National Reporter System*.

A comparison of the enactment in hand with similar provisions in other states is also made possible by such compilations as New York State Library Bulletin: *Legislation by States*, 1890-1908; the Library of Congress, Legislative Reference Service: *State Law Index*, 1925/26 to date; and *State Legislation, Monthly Summary* 1941/42 to date; also *Public Affairs Information Service*, 1920 to date; and *Martindale-Hubbell Law Directory: Law Digests* (in this directory the most recent laws of each state are set forth in digest form). Once the statutory material has been exhausted, the search should be extended into the judicial precedents and lesser authorities.

Loose-leaf services for state law in various fields should also be consulted.

**Rules of Court.** Rules of court in a particular jurisdiction are of almost equal importance with rules of substantive law. There is, however, a tendency on the part of beginners to underestimate their importance in the conduct of litigation. The preparation of a case for trial should never be considered to be complete before the rules of court pertaining thereto have been thoroughly investigated.

#### *Finding Rules of Court.*

The place in which the rules of federal courts are printed is indicated by the Chart on pages 188-189. If these sources are unavailable, the pamphlet edition of the rules of the particular court should be used. These may be obtained from the clerks of the respective courts. If possible, the rules should be read in one of the annotated editions.

The location of the rules of the state courts and their amendments is indicated by the Chart printed in 33 Law Lib. Jour.

127 (1940). When these sources are not available, the rules may sometimes be found in the local practice manuals. Copies of the pamphlet editions can be obtained from the clerks of the various courts. If possible, an annotated edition should be used.

Lawyers should keep on hand copies of the rules of all courts before which they practice, and should prepare annotations for them if annotated editions are not available.

### *Judicial Interpretation.*

Federal. The interpretations given specific rules in federal courts may be traced by means of the annotations in the *United States Code Annotated*, the *Federal Code Annotated*, Mason's *Federal Court Rules Annotated*, the *Federal Rules Decisions*, and the *Federal Rules Service*, as well as by means of the citations in the *Digest of United States Supreme Court Reports* (vol. 11), the *Federal Digest* (vol. 72), Shepard's *United States Citations* (for Supreme Court Rules), Shepard's *Federal Citations* (for Federal courts other than the Supreme Court), the bound volumes and advance sheets of the *Supreme Court Reporter*, *Federal 2d*, *Federal Supplement*, and units of the *National Reporter System* issued since the last unit of Shepard's.

Assistance in interpreting those rules which have not yet been passed upon by the courts may be had from such works as *Federal Court Rules Annotated* (Indianapolis, Bobbs-Merrill Co., 1948), Ohlinger's *Jurisdiction and Procedure* (Rev. ed.), and Moore's *Federal Rules and Official Forms* (1947 pamphlet). Editions which contain the "Notes" of the respective Advisory Committees and the Institute Proceedings are of the highest importance in this work.

Since statutes enacted prior to the Federal Rules which are not inconsistent with the provisions of the Rules are still in effect, it is well to investigate those which govern jurisdiction, venue, process, and procedure as they are found in the *U. S. Code*. Ohlinger's revised edition, volume 2 brings these statutory provisions together in a very useful form.

State. The judicial interpretation of state rules of court may be investigated by means of the Shepard's *Citations* for the particular state, as well as by the various local practice manuals and digests. Here again the statutes should be searched for

any additional provisions with regard to jurisdiction, venue, process or procedure which may be applicable.

*History of Rules of Court, Amendments, Revisions, etc.*

Federal. The supplements to the *United States Code*, and the annotations in the *United States Code Annotated*, the *Federal Code Annotated*, Mason's *Federal Court Rules Annotated*, *Federal Rules Decisions*, and *Federal Rules Service*, and the current advance sheets of the reports of the various courts record any alterations in the rules. This information may be supplemented with the *Shepard's Citations* which covers the particular court rules under consideration. Changes are also printed in the *United States Code Congressional Service*.

State. *Shepard's Citations* for the particular state is often the only means of discovering changes in the rules other than the advance sheets of the state reports and *National Reporter System* units. Some courts, however, issue changes in slip form which may be pasted in the pamphlet editions at the appropriate place.

**Municipal Materials.** Municipal regulation, like all other phases of government control, is increasing in scope. Unfortunately there is not a concomitant development in the systematic publication of ordinances or acts under delegated authority. The sphere of municipal regulation is by far the most inadequately documented of all fields of the law.

*Finding Municipal Ordinances and Regulations.* It is nearly always impossible to find even a majority of municipal ordinances and regulations in either municipal, county, state, or law school libraries. Usually it is a necessary and a wise precaution to make inquiries at the office of the clerk of the municipality or of the corporation counsel. The index of the local digest should be consulted because it may lead to cases which cite applicable ordinances and regulations.

*Judicial Interpretations of Ordinances, etc.* When the existence of a municipal regulation has been discovered, its interpretation by the courts can be traced by means of local digests and of *Shepard's Citations* for the particular state in which the municipality is located. In rare instances a U. S. Supreme Court ruling may be found by means of Vol. 1 of the Co-op: Di-

gest. The provision can be further analyzed on the basis of the principles set forth in standard treatises and textbooks on municipal government. Case cards should be made out for citations to cases in point.

*Legislative History of Municipal Ordinances, etc.* Because of the paucity and general inaccessibility of case and secondary material more dependence than ordinarily will have to be placed on the local rules of statutory interpretation. Local state rules will apply where an ordinance is delegated legislation. They may also apply when the ordinances were passed by a Home Rule government. *Shepard's Citations* for the particular state will provide valuable information in regard to whether or not the provision in question has ever been amended, repealed, or revised.

Most reliance, however, whenever possible should be placed on an investigation of judicial precedents and lesser authorities in searching for municipal materials.

**Administrative Material.** The routine of search which seems most feasible here is quite similar to that employed in working with legislation and judicial decisions. Loose-leaf services which cover the particular field in which the problem lies are the most fruitful sources of material. There are two services of a general nature: *C. C. H. Federal Administrative Procedure* and Pike and Fischer's *Administrative Law*. There are also many specialized services published by Commerce Clearing House, Prentice-Hall, Alexander, and other companies. As a general rule, they are well equipped with elaborate indexes, tables, citators, finding lists, etc. Any one of these keys may be utilized with comparative ease as a means of discovering applicable administrative provisions. The *Code of Federal Regulations* with its Cumulative Supplement (1943) and subsequent annual supplements in conjunction with the subsequent daily issues of the *Federal Register* provides another source of pertinent material. Annotated and unannotated editions of the various statutes under which the agencies operate and separate editions of their rules and regulations afford still another source. While it is true that the passage of the Administrative Procedure Act of June 11, 1946 has rendered much of the material obsolete which is to be found in treatises published before its enactment, it will not be long before



new treatises and pocket supplements to old ones will bring such secondary material to date.

Once a rule or regulation or rule of procedure has been found by means of any of these publications, three questions should be answered before carrying the search further. First, is the act under which the agency is operating constitutional? Second, did the agency observe all of the formalities prescribed by the act and by the Administrative Procedure Act in promulgating the rule or regulation? Third, does the rule or regulation or rule of procedure go beyond the meaning of the statute, i. e., is it *ultra vires*?

There are two aspects to the question of the construction and interpretation of administrative material. First, how has the provision been interpreted by the agency in its decisions, orders, rulings, findings, etc.? and second, how has it been interpreted by the courts? In answering these questions the loose-leaf services and the various sets of administrative reports of the various agencies with their digests and indexes are of equal importance with the judicial reports, digests and indexes. Such publications as the *United States Code Congressional Service* and the *United States Law Week*, both of which publish the proclamations and executive orders of the President and a selection of administrative rules and regulations and rules of procedure are also of assistance.

For provisions which have not been passed upon either by the agency or by the court, much material concerning legislative history may be found in the loose-leaf services, the *United States Code Congressional Service*, and official publications of the legislative history of the authorizing act.

Since the state governments in recent years have followed the example of the federal government in the enactment of social legislation and laws regulating industry, they have found it necessary to add to the already existing regulatory agencies many new ones charged with the duty of administering the new legislation. To these agencies, also, in many instances has been delegated the power to write their own provisions or to fill in the broad mandate of the legislature. It is advisable, therefore, in dealing with problems in administrative law to ascertain whether there are any applicable state as well as federal rules and regulations, rules of procedure, practice and evidence, and

decisions, orders, rulings, and findings, which must be considered in any fully worked out solution.

**Administrative Law—Loose-Leaf Services.** The type of service afforded by the Commerce Clearing House, Prentice-Hall, and other loose-leaf publishers greatly facilitates research in those complex fields of law in which administrative regulations and rulings play as important a part as do statutes and judicial decisions. It provides the student and practitioner with a means of keeping in touch with the very rapid developments in each field, and brings together for them in well-organized units the applicable law. Since the various services are highly specialized, it is advisable before using any one of them to read carefully the introductory section which outlines its scope and content and often explains particular features and methods of use.

*Finding Material.* As each service is equipped with an elaborate topical index to the basic service as well as a cumulative index to the current sections, tables of cases, and topical analyses of statutes and administrative rules and regulations, it is possible to use the word, the citation, or the topic approach in the search for material.

*Constitutionality and Validity of Provisions.* Statutes; administrative rules and regulations; rules of procedure and practice; decisions, orders, rulings and findings; proclamations and executive orders of the President; forms; in fact almost everything necessary in making a tentative forecast of the stand which the courts or administrative agencies may take relative to the validity of a provision will be found in the services.

*Administrative and Judicial Interpretation.* Digests of administrative decisions, orders, rulings and findings as well as of judicial decisions interpreting administrative provisions are printed in conjunction with the specific statutes or rules and regulations to which they apply. Case cards should be made for decisions in point. The citator in the particular service and the proper unit of Shepard's *Citations* should then be checked under the statutory section to obtain additional citations where they exist. Finally the status of the cases should be checked both in the citator to the service and in the proper unit of Shepard's.

Full advantage should be taken of any additional features such as bibliographies, etc.

**Administrative Material—The Code of Federal Regulations of the United States of America.** The rules and regulations of federal agencies having general applicability and legal effect in force June 1, 1938, were published as *The Code of Federal Regulations*. A *Cumulative Supplement* was published in 1943. The *Code* is kept current by annual supplements and by the daily issues of the *Federal Register*. A new edition will be issued in 1949 which will be kept current by pocket parts. It is divided into fifty titles which are in turn subdivided into chapters each of which is assigned to a particular agency according to the subject matter of its regulations. The titles closely parallel those of the *United States Code*.

*Finding the regulations or rules of procedure.* There is a Table of Titles and Chapter Headings in each volume immediately following the preface. Each chapter is preceded by a list of its parts; each part by a list of sections and any other subdivisions which are given special emphasis. The general or subject index is contained in Volume 15. There is an index in each volume of the *Cumulative Supplement* and in each annual supplement; also a "Table of Documents Published in the *Federal Register*" which lists under the various titles and chapter headings the description, date, *Federal Register* citation, and *Code of Federal Regulations* citation of each document included.

The *Code* contains no secondary material. The legislative history and judicial and administrative interpretation of provisions found in the *Code* must be obtained through the aid of the loose-leaf services, the volumes of decisions of the various agencies and their digests, and *Shepard's Citations*.

The *Code* does not contain administrative decisions, orders, rulings, findings, etc. It is confined to reporting the organization and substantive and procedural rules and forms used by the various agencies. In conformance with the provisions of the Administrative Procedure Act of June 11, 1946, all government agencies filed with the *Federal Register* an outline of its organization and a codified statement of its substantive rules and regulations and procedural rules and forms in force on August 15, 1946. These were first printed in the *Federal Register*, volume 11, part 2 (1946) and were later reprinted in the 1946 Supplement to the *Code*. These volumes contain an elaborate table for this material.

With the aid of the citations obtained from the *Code of Federal Regulations*<sup>1</sup> the search may be shifted to the loose-leaf services.

**Same—The Federal Register.** Since March 14, 1936, the proclamations and executive orders of the president, the rules and regulations of the several executive departments and administrative agencies, and the decisions, orders, and rulings, as well as the rules of practice and evidence of the federal administrative tribunals—all such items of a general nature—have been published in the *Federal Register*. Daily issues are published Tuesday through Saturday of each week, except on days following holidays. The daily issues contain an index which is cumulated at the end of each month. Monthly indexes are cumulated at the end of each quarter; again at the half year; and a final cumulation is made at the end of the year. The indexes to the daily issues since June 1, 1938 have been arranged on the basis of the titles of the *Code of Federal Regulations* which supersedes the *Federal Register* volumes issued prior to that date. The "Related Documents Table" which was issued with the annual index of the *Federal Register* up to that time has been supplanted by the "Table of Documents Published in the *Federal Register*" which is contained in the annual supplement to the *Code of Federal Regulations*.

**Finding the Material.** Documents in the *Federal Register* can be found by means of the daily, monthly, quarterly, semi-annual, and annual indexes.

**Construction and Interpretation.** Administrative decisions, orders, and rulings interpreting and applying rules and regulations and rules of practice, procedure, and evidence can be found by means of the indexes. With the aid of citations found in the *Federal Register* the search can be shifted to the loose-leaf services.

<sup>1</sup> For an article on the use of the Federal Register and the Code of Federal Regulations and the method of locating in the Code material which has been published in the Register, see Wigmore, "The Federal Register and the Code of Federal Regulations; How to Use Them—If You Have Them," 29 A. B. A. Jour. 10 (1943).

For an explanation of the background, scope, and use of the Code of Federal Regulations refer to the general preface in vol. 1.

**Same—United States Code Congressional Service.** Each of the pamphlet supplements issued throughout the session contains proclamations and executive orders of the president and administrative rules and regulations. Material from the various sections of the pamphlet supplements is cumulated in the corresponding sections of the annual bound volume.

*Finding the Material.* Proclamations and executive orders of the president are listed chronologically in separate tables. They are also indexed with the administrative rules and regulations in the general index. The indexes and the tables in the pamphlet supplements are cumulative and are superseded by the indexes and tables in the annual bound volume.

*Construction and Interpretation.* For the construction and interpretation of materials found in the *United States Code Congressional Service* it is necessary to shift the search to the loose-leaf services or to the volumes of decisions, orders, and rulings of the various agencies and their digests.

**Same—United States Law Week.** The *United States Law Week* publishes selected proclamations and executive orders of the president, rules and regulations of the executive departments and administrative agencies of the government, along with decisions, orders, rulings, etc., also digests decisions of the state and federal courts.

*Finding the Material.* There is a semi-annual and an annual index. In addition the digests of cases are arranged in a classified order.

*Construction and Interpretation.* The selected decisions, orders, and rulings of executive departments and administrative agencies provide a means of examining some of the current interpretations and applications of administrative rules and orders.

The citations obtained through the use of the *United States Law Week* can be used when the search is shifted to the loose-leaf services and to the volumes of decisions, orders, and rulings of the various administrative agencies and their digests.

**Judicial Material—Introductory.** Sooner or later nearly all legal research leads to an investigation of judicial material. In those cases which do not involve legislative or administrative

provisions, the search will be confined to judicial materials. In those cases which do involve legislative or administrative provisions it will be necessary to learn how the provisions have been interpreted by the courts either by means of the leads found in the secondary material which has been used or by means of further or independent search in the judicial materials.

While for purposes of efficiency a definite routine should be kept in mind throughout the search, it should be varied in accordance with the importance of the case, the material found, and the time available. A definite routine is of advantage to a beginner. An experienced lawyer who has long practiced in a field may, perhaps, rely on associational suggestion after having analyzed his facts and omit many of the steps. Even for him, there would be a danger that his memory might prove false. For the practicing lawyer, as well as for the beginner, the amount of time lost is a small price for the assurance of a complete search.

**Same—Preliminary Steps.** The general routine of research in judicial material is much the same as that in legislative and administrative material. There are the same three approaches to the problem, i.e., the word, the citation, and the topic approaches. The basic information necessary for the use of each is the same, i.e., for the word approach, a list of words and phrases describing the facts in question; for the citation approach, a citation to a case in point; for the topic approach, a clear conception of the topics under which such a problem is treated in the books. This preliminary information is obtained in much the same manner as when dealing with legislative or administrative material. First of all the facts must be mastered. Those facts which are salient or essential to the problem must be abstracted from those which are not. They must then be arranged in either a logical or chronological order. Finally, they must be restated as well as possible in legal language. Not until this has been done, should any attempt be made to look up the law.

Any definitions which are essential to the solution of the problem should then be examined. Although the various encyclopaedias, digests, and indexes to annotations contain leads to this material, by far the best tool for this purpose is the set called

*Judicial and Statutory Definitions of Words and Phrases*, or simply *Words and Phrases*. The Permanent Edition, with its pocket supplements should be used. It can be brought to date by means of the Tables of "Words and Phrases" in the bound volumes and advance sheets of the *National Reporter System* which have been issued since the publication of the pocket supplement. To the Definitions in this set are appended the citations to the sources from which they were extracted. These citations to cases in point should then be noted each on a separate case card. The use of *Words and Phrases* is one of the most rapid methods with which to discover the citations necessary as a basis of the citation approach.

The next step is the preparation of a list of words and phrases descriptive of the facts. This is made possible by analyzing the facts: (1) the cause of action (What happened?); (2) the parties (Are they of a particular class, relation, or occupation?); (3) the subject matter (What place or thing is involved?); (4) the object of the action (What relief is sought?); and (5) other points in issue. From such an analysis a list of descriptive words and phrases can be prepared as a basis of the word approach.

The selection of the proper topics for the topic approach is facilitated by the charts issued by the American Law Book Company for the *Corpus Juris* system and by the Lawyer's Co-operative Publishing Company for *American Jurisprudence*. Familiarity with both of these charts is an invaluable asset in research.

An analysis of the legal background of the problem should then be prepared. The purpose of this analysis is to provide a general conception of the legal framework into which the problem must be set and, equally important, to provide more citations for the citation approach. There are several types of books which will prove useful for this purpose—legal treatises, legal encyclopedias, the *Restatements*, legal periodicals, case books, and to some extent class notebooks. The index word list, case cards, and text cards facilitate the finding of the proper material in these secondary sources. Citations gathered from them should be noted on separate case cards; and quotations from as well as notes on the text should be noted on text cards. When text notes refer to a specific case, the text card can be filed with

the case card. Research in secondary sources should be abandoned as soon as either the general legal problem is understood or it is realized that the point under investigation is so minute that a comprehensive treatment of it is not to be expected in the texts.

**Same—Textbooks.** After the problem has been analyzed as accurately as possible, an "Index List" should be made of apposite words and phrases under which it is thought an indexer might possibly classify material dealing with the question. With the assistance of the charts provided by the American Law Book Company and "The Co-op.," a selection should be made of the topic headings under which it seems the problem may be treated in the encyclopaedias and textbooks. From treatises upon the appropriate subject there should be selected, if possible, the latest edition of several standard texts. It may be difficult to secure any reliable evaluation from book reviews because they vary in reliability, but ordinarily an inquiry directed to a law librarian, a practitioner or a law teacher will procure sufficiently accurate information. Two approaches to the material are possible, the topic approach through the table of contents and the word approach through the index. If the book treats the question at all, a case card should be made for each case cited by the author in support of his opinion. The front of the card should be reserved for the title, citations, and later an abstract; while the back should be used to record statements concerning the case with the citation to the text in which the opinion was expressed and later the citation history of the case. Another card should be made for any quotations from or notes on the text. Finally, any new words or phrases should be added to the index list.

Never accept the opinion of a text writer before checking personally the cases which he offers in support of it. Never cite a case without reading it.

**Same—Encyclopaedias.** It is unprofitable to examine older encyclopaedias when new ones are available. In using an encyclopaedia usually only two methods of approach are possible, the topic and the word approaches. Some British encyclopaedias have a table of cases which makes it possible to use in addition the case or citation approach. If the topic approach is



chosen, the analysis of the topic will provide the key to the material. First the main headings should be examined. When the proper main heading has been chosen, the main subdivisions of that heading should next be examined. After the proper subdivision has been selected, then the proper section of the subdivision and the proper subsection of the section. It is never advisable to read through the analysis from beginning to end. Before reading the text of the section or subsection, a note should be made in the index list of any cross-references which may be given. The material in the encyclopaedia should be treated in the same manner as that in textbooks. If there are supplements of any kind or pocket parts they should also be examined. It should be remembered, however, that the principal value of an encyclopedia, as well as of textbooks, is not as a compendium of the law, but as a form of digest. All citations must be checked before being used.

If the *Corpus Juris* system is used, it will be necessary to add to the citations found in the notes to *Corpus Juris Secundum*, the citations to be found in the pocket parts and in the annotations to the same article in *Corpus Juris*. If *American Jurisprudence* is used, advantage should be taken of the citations to the *Restatements* which are included in the notes.

**Same—The Restatements.** The *Restatements* are perhaps the most authoritative of all text materials. They were prepared by recognized experts in the subjects covered. While the main text is unsupported by citations, it is possible to determine the state of the law on any point by using the State Annotations and to determine the attitude of the courts and writers in legal periodicals by using the *Restatements in the Courts*. There are, of course, many propositions of law upon which there is no case law. In presenting arguments on these points, great weight is given to the opinions expressed in the *Restatements*. Two methods of approach are open, the topic and the word approaches. For the topic approach the key is the table of contents which presents a complete analysis of the subject. This should be examined in the same manner as the analyses of articles in encyclopaedias, i.e., first all main divisions, then principal subdivisions, then sections, etc. The key for the word approach is the General Index. This may prove somewhat difficult to use

because it is a modified topic and fact word index with cross-references to all parts of the *Restatements*. It is sometimes possible to use the citation approach if one has been so fortunate as to find citations to the *Restatements* in his use of *American Jurisprudence*. As usual case and text cards should be made and any new descriptive words and phrases added to the index list.

For the word approach the key is either the index to the individual *Restatements* or the General Index. The latter is a modified topic and fact word index with cross-references to all those places in the *Restatements* in which a topic is treated. It is sometimes difficult to use.

**Same—Citations.** It is advisable before beginning the search for judicial decisions to complete the citations obtained from dictionaries, treatises, encyclopedias, articles in legal periodicals, and the annotations to *Restatements*. Full citations will include the three possible systems in which the case may have been reported, aside from any special subject series or case books, i.e., the official state or federal reports; the *National Reporter System*; and the annotated case series, if any. Such a procedure will not only save time by eliminating any search in reports other than those in which the cases are to be found, but it will also facilitate the location of any case in whatever series is most accessible. The full citations for almost all American cases may be obtained from the Table of Cases for the *American Digest System*. This table includes almost all cases decided by courts of last resort from 1658 to the present; and it lists under each title the official, *National Reporter System*, and annotated case series citation; the final disposition of the case; and, in addition, the topics and key-numbered sections under which the case has been digested. When the information in hand consists of no more than the title of a case, it is necessary to search the tables of cases for successive units until the case is found. When the title and date are both known, it is possible to go directly to the proper table of cases. If only a citation is known, it is necessary to secure the title and date from the report before using the table of cases. However, since the official report may not always be available, recourse may be had to the *National Reporter System*, if it is at hand. The official citation may be translated to a Reporter citation by means of the cross reference tables of the *National Re-*

*porter System Blue Book*. Note also, that it is possible by using the Blue Book tables in reverse to change a *National Reporter System* citation to an official citation. A popular name title on the other hand must first be translated into a regular citation by means of the Table of Popular Name Titles in the front of Volume 34 of the *Fourth Decennial Tables of Cases*, Volume 15 of the *United States Supreme Court Digest* (Key-Number) and its pocket part, Volume 72 of the *Federal Digest* and its pocket part, or the *Shepard's Table of Cases Cited by Popular Name* (latest edition).

For British cases the Consolidated Table of Cases, Volumes 45 and 46 of the *English and Empire Digest*, serves approximately the same purpose as the Table of Cases for the *American Digest System*. It contains, in addition to the complete citations, the topic under which the case is digested and the number given the case and thereby makes it possible to find almost all other cases whether English, Irish, Scotch, Dominion, or Colonial, which are in point. Volume 24 of Mews' *Digest of English Case Law*, 2d ed. and supplements is also useful.

If the English cases are known, it is sometimes possible to find American cases which uphold the same rule of law. First, it is necessary to find a report of the English case in one of the annotated series. There is a Consolidated Table of English Cases in Volumes 26 and 27 of the *English Ruling Cases*, for decisions before 1900, which may be used for this purpose. For cases which were decided after 1900, there are tables in Volume 10 and the latest volume (vol. 16) of *British Ruling Cases*. In addition to the latter, there is also a Table of Cases in the back of Volumes 1 and 2 of the *Digest of American and English Annotated Cases* which covers the period 1905 to 1919. English, Canadian, etc., cases are also occasionally included in the notes in *Lawyers Reports Annotated* and *American Law Reports Annotated*. If the English case can be found in one of these sets, any American cases in point which are known to the editors will be listed in its annotation. Should this method fail, still another method lies open. The English case may be looked up in the tables of cases in American treatises and text books on the special subject, or even in English treatises and texts when they are available. The likelihood is that if the English case is found therein, any American cases in point will be cited in the discussion or footnotes to the English case. The titles of the

American cases obtained in this manner can then be looked up in the Tables of Cases for the *American Digest System* to obtain the topic and key-number under which other American cases may be found. Redstone's *Table of English Cases Construed or Cited by the Supreme Judicial Court of Massachusetts*, vols. 133-220 (1882-1915), may prove helpful.

**Same—Choice of a Set.** Once the preliminary work has been completed, the next step to be taken is the choice of the proper set in which to begin the actual search for cases. This choice depends somewhat upon the problem which is to be solved. Some problems, for instance, fall within the field of one of the loose-leaf services or special subject sets. Much valuable time is often saved by making use of these specialized forms of reporting, for the editors make a point not only of gathering all the important cases, but also of supplying excerpts from and references to much of the available related material such as forms of pleadings, approved instructions, applicable legislative and administrative provisions, and in some cases even text discussions.

**Same—Loose-Leaf Services and Special Subject Reports.** It is usual to begin the search in any material by means of the citation approach whenever that is possible, going directly to the cases or to that part of the digest in which specific cases in point are digested. Preliminary work, however, rarely furnishes any citations to the loose-leaf services or to the special subject reports. It is, therefore, necessary to check the name of the cases in hand in the table of cases for the set in order to find whether or not they are reported in it. If they are not, it will be necessary to make use of the word or of the topic approach to the digest or index in order to find other cases in point. Case cards should be made for any new cases and statute or text cards for any new material discovered in this way. New descriptive words or phrases which occur in the search should be added to the index word list. After the possibilities of this material have been exhausted or if it is found that the problem does not fall within the scope of the set, the search should be transferred to or begun in some other medium.

Next to the loose-leaf services and the special subject reports, by far the best sets in which to secure a review of the state of the law on any problem of general interest are the annotated

series. The current set of this type is the *American Law Reports, Annotated* (cited: 1 A. L. R. 1). If either preliminary research or the use of the special subject reports or the loose-leaf services has resulted in the finding of citations to cases in the annotated series, the cases can be approached directly. If, on the other hand, no citations have been found, the search may be carried on by means of the word or the topic approach. Cards should be made for any new cases, text, or statute material discovered, and any new descriptive words or phrases added to the index word list.

**Same—American Law Reports.** All three methods of approach are possible in this set. For the word approach the keys to the set are the L. R. A. Word Index, which serves for both the L. R. A. and the A. L. R., and the A. L. R. Word Index to Annotations. If the latter is used care should be taken to check the main set of three volumes, the 1948 Supplemental Volume, and the pocket parts in the main set. The L. R. A. Word Index will lead to topics in the A. L. R. Index-Digests (vols. 1-5) and the temporary A. L. R. Digest with its pamphlet supplement. It is sometimes advisable to begin the search in Volume 5. However, it is possible to start in any of the volumes. The pamphlet supplement in such a case is the least satisfactory. Under the digest topic and section referred to in the L. R. A. Word Index, examine the paragraph or line summaries and select those most nearly in point. Note the citation to each in full. Then before leaving the section, read carefully the cross-references, if any, which immediately follow the section title line. These references are important for they represent the effort of the editor to point out other phases of the same problem which might otherwise be overlooked by the searcher. At this stage it is best to select cases directly against as well as cases in support of the solution sought since the annotations to each case include authorities on both sides of the question. If the A. L. R. Word Index to Annotations is used, it will be found that the citations are directly to notes in the reports. All citations in point should be collected from both the A. L. R. Digests and the A. L. R. Word Index to Annotations and noted on case cards. The cases should then be read. If a case is of no use, make a note of this fact in the step by step record of your search. "If

it is in point, check its status in Shepard's *Citations*. Then, provided that the case is still good authority, abstract it. The abstract should be entered on the face of the case card. The history of the case should be noted on the back. From the annotations to the case select the citations to any other cases which seem in point and note them on case cards. Look up these cases and treat them in the same manner as the principal case. Follow up cases by means of the A. L. R. Blue Book of Supplemental Decisions, Permanent Volume, and pamphlet supplement. It is essential to remember in using the Blue Book that the citations under which it lists material are those of the annotations to cases and not of the cases themselves. It is possible, therefore, to use the Blue Book directly after using the Word Index to Annotations. In using it directly after the Index-Digest care must be taken to select the citations to notes and not to cases as the basis of search. When volumes of the A. L. R. are off the shelf, it is often a time-saving expedient to go directly to the Blue Book in order to secure other citations in point where they exist. When earlier annotations in L. R. A. contain important material, they are referred to in the annotations in A. L. R. Material can be brought close to date by using a citation for an A. L. R. case in point as the basis of the citation approach to the *American Digest System*, current pamphlet supplements to the General Digest, and by carrying the search to subsequently published pamphlet advance sheets of the *National Reporter System*.

Since all citations to cases found through the use of text books, encyclopedias, *Restatements*, etc., have already been completed, it is possible to select those in A. L. R. and go directly to the cases and annotations and proceed as outlined above. If it has been impossible to complete the citations, use should be made of the latest A. L. R. Table of Cases with Parallel References to Official Reports.

With the topics obtained in analyzing the facts, it is possible to use the topic approach and go directly to the analysis of topics in the Index-Digests. Before using the topical analysis glance through the cross references which follow the analysis to see whether or not the particular phase sought is digested under some other topic. When the proper section has been located, proceed as outlined above.

Other sets of annotated reports may be used in much the same manner.

Some problems, however, are so specialized in their nature that they are not dealt with in loose-leaf services, special subject or annotated reports. To find cases dealing with them or to find still further cases for problems which were treated in the special subject, annotated, or loose-leaf systems, it will be necessary to extend the search to the *American Digest System*. By doing this nearly all cases in point can be located.

**Same—American Digest System.** The *American Digest System* is built on a scheme of classification in which all propositions of law are divided into seven *Categories*: Persons, Property, Contracts, Torts, Crimes, Remedies, and Government. These categories are divided into thirty-four *Classifications*, which, in their turn are subdivided into over four hundred *Topics*. The topics are arranged alphabetically in each of the five units of the system. Each topic is prefaced by a scope note which shows what is included and excluded from treatment under it. Each topic is also provided with an analysis showing its main divisions, subdivisions, sections, and subsections, and with cross references pointing out other topics under which specific phases of the material are treated. It is the purpose of this Digest to give every proposition of law a specific topic and section or key-number under which cases dealing with it will always be digested. When the topic and key-number covering a proposition is found, therefore, it is possible to locate all cases in point.

The set is composed of the Century Edition, covering all American cases from 1658 to 1896. This is not key-numbered. It is supplemented by five Decennial Digests, bringing the set down to 1946, and a General Digest, 2d Series, composed of monthly paper-bound supplements which are cumulated into bound volumes at the rate of about three to a year.

All three approaches may be used to the material in this digest. For the word approach the key is the Descriptive Word Indexes; for the topic approach, the analyses of topics; and for the Citation approach, the Table of Cases. Once the proper topic and key-number have been located by any one of these means, it is an easy matter to carry the search through the period 1896 to date. For earlier cases it is necessary to translate the key-num-

ber into a section number by means of the reference line found immediately under the key-number section line in the volumes of the Second Decennial. Record the citations to all cases in point on case cards. Then read the cases. When possible, read them in an annotated series, or, when that is not obtainable, in the *National Reporter System*. When cases in point have been found, check their status in *Shepard's Citations*. Abstract those which are still good law.

**Same—Local Digests.** Since, however, systems of classification differ, with the result that cases lost under one system are sometimes found under another, it is never safe to consider the investigation of the local aspects of any problem complete until the local digest has been examined. This is especially true in those instances in which the local digest is not built upon the key-number system but upon an independent system of classification and examination of the cases.

**Same—Records and Briefs.** Finally, the records and briefs for local material should be examined if available. It should be remembered that the transcripts of records are especially useful in the preparation of trial briefs, because they contain detailed information in regard to the manner in which each case arose and was presented in the lower court, i. e., the form of the pleadings, evidential rulings, etc. The briefs, on the other hand, provide, for what they are worth, the outlines of the arguments presented. They may, therefore, suggest leads to local material hitherto undiscovered in the search. Supplementary persuasive material from other jurisdictions may be obtained from the *American Digest System* by means of the citations discovered in the briefs.

**Same—British.** It is not unlikely that in some rare instances the search may have progressed to this stage with little, if any, applicable American case law having been discovered. In such a predicament, it is advisable to extend the search to the British materials. The routine to be recommended is very much the same as that suggested for American materials. An analysis of the general setting of the problem can be obtained from Halsbury's *Laws of England*, 2d ed., or from *Jenks' English Civil*



*Law*, 4th ed., or some other encyclopaedia or from a treatise on the subject. The same order of choice lies open in the use of sets of reports: (1) special subject reports or loose-leaf services; (2) annotated reports; (3) a general digest, e. g., the *English and Empire Digest* or *Mews'*. Irish, Scotch, British Dominion and Colonial cases are digested in the *English and Empire Digest* when they are not of purely local interest. They may also be found by means of the various local British digests. If English cases in point are known, it is sometimes possible by means of them to find American cases which stand for the same rule of law. One method is to check them in Redstone's *Massachusetts Citations*, in which there is a table of English cases construed or cited by the Supreme Judicial Court of Massachusetts, in volumes 133-220 (1882-1915) of the Massachusetts reports. If the case cannot be found in this work, it may sometimes be located in the table of cases for one of the annotated series. For cases prior to 1900, the Consolidated Table of English Cases in Volumes 26 and 27 of *English Ruling Cases* may be used. For those after 1900 the table of cases in Volumes 10 and 16 of the *British Ruling Cases* serves the same purpose. There is also a table of cases in the back of Volumes 1 and 2 of the *Digest of American and English Cases Annotated* (1905-1918). If an English case can be found in one of these sets, American cases in point will be found in the annotations. Should this method fail still another lies open. The English cases may be looked up in the table of cases in the proper American treatises. If the English case is discussed or cited, it is likely that any American cases in point will be cited also in the discussion or in the footnotes. The title of American cases found in this way may be looked up in the Table of Cases for the American Digest System to discover the topic and key-number under which like cases are digested.

**Same—Citation Books.** If the steps outlined above have been followed there will now be, in addition to the step by step record of the search, a case card for each case bearing upon the subject found in textbooks, encyclopaedias, *Restatements*, loose-leaf services, special subject reports, annotated case series, and digests. If any of these cases are in the United States Supreme Court Reports, the citations should be checked in Rose's *Notes*

in order to find whether or not those portions of the cases which deal with the problem have ever been considered in later opinions. For each new opinion thus discovered a case card should be prepared. If the case was tried in state court advantage should be taken of any *Notes* for the state reports similar to Rose's *Notes*.

The status of all cases, not previously so treated, should be checked in the appropriate units of Shepard's *Citations*, and federal cases earlier than 1902 may also be checked in Ash's *Federal Citations*. In order to check a case in the citation books it is necessary to know the number of the paragraph in the syllabus or headnotes which states the point for which the case is to be used as authority. This number should be obtained from the official reports or from the *National Reporter System*. With the citation and this additional information it is possible to secure references to all subsequent cases in which either the pertinent paragraph is treated or the case in general is cited. For each such citation a new case card should be made, and the citations thus gathered on the status of a case should be noted on the back of its case card.

**Same—Periodicals.** The index-word list obtained from the initial analysis of the facts and subsequent use of search materials provides the basis for the next step, the investigation of pertinent articles in legal periodicals. There are two indexes, that of Jones and Chipman and that of the American Association of Law Libraries. Each has an author, and a topic and fact word index. In addition, Volume 3 of the Jones and Chipman index and all volumes subsequent to 1916 of the American Association of Law Libraries index include a case index. Recent volumes of the latter also include a separate section for book reviews.

The importance of the thorough and scholarly treatments of difficult points of law and of the penetrating and exhaustive comments on recent cases and legislation which, as a general rule, are featured in legal periodicals cannot be overstressed. Of late, it has been so recognized by the bench and the bar as well as by the legal profession and law teachers that citations to and digests excerpts and reprints of these articles are to be found in loose-leaf services, *Restatements*, and such works as the *United*

*States Code Congressional Service, Federal Rules Decisions, and Federal Rules Service* and citations to them are now included in *Shepard's Citations*.

All relevant material from legal periodicals should be treated in the same manner as textbook material. No statements should be accepted as valid until the authorities cited have been read.

**Other Methods of Search.** It is thought that the foregoing order of search is well suited for the beginner; and that it will give at least as good results as any other for the experienced practitioner who desires to exhaust the authorities. If one is content to believe the advertisements of every law book publisher, the search of a single encyclopaedia, or of a digest, or the discovery of a note in a series of selected cases will reveal all the law—at least all the law worth considering. Credulity may be a great labor-saver, but it is not the mark of a lawyer or of a scholar. If the legal authorities are to be exhausted, all the foregoing steps must be taken. It is possible to take them in a different order. One may begin with a series of selected cases; one<sup>a</sup> may have a case in point and work back through the various tables of cases; one may commence with the *American Digest System*; or with a case that has a key number syllabus paragraph, and thus get a start in the *Decennial Digest*. Furthermore, the thoroughness of the search to be made in any instance may largely depend upon the books available and the object to be attained. But whatever the extent of such search, it should be made systematically so as to avoid waste motion and unnecessary duplication of work.

## APPENDIX

### REPLEVIN

#### *Writ*

The King to the Sheriff, Health:

I command you, that justly and without delay, you cause G to have his beasts by gage and pledges, of which he complains that R has taken them, and unjustly detains them for the customs which he exacts from him, and which he does not acknowledge to owe him; and in the meantime, cause him justly, etc., least, etc. Glanville (Beale's edition of Beames), 238.

The King to the Sheriff, etc.: We command you that justly and without delay, you cause to be replevied the cattle of P, which D took and unjustly detains, as it is said, and afterwards thereupon cause him justly to be removed,<sup>1</sup> that we may hear no more clamour thereupon for want of justice, etc.

Pledges .....

(Fitzherbert *Natura Brevium* 68 D.)

N. B. In the classic period of common law procedure replevin was begun by plaint rather than by original writ.

#### *Declaration*

In the Common Pleas.

Hilary Term in the fourth year  
of the reign of King .....

Middlesex, to wit: D, the defendant in this suit, was summoned to answer P, the plaintiff in this suit, of a plea wherefore he took the cattle of the said P and unjustly detained the same against sureties and pledges until, etc., and thereupon the said P, by A, his attorney, complains: For that the said D, on the .... day of ....., in the year of our Lord .....

<sup>1</sup> The Latin "deducere" is more sensibly translated "to be dealt with," thus "cause him to be justly dealt with" rather than "justly to be removed."

in the parish of X in the County of Middlesex in a certain close there, called Blackacre, took the cattle, to wit, seven milch cows, of the said P of the value of one hundred pounds, and unjustly detained the same, against sureties and pledges, until, etc.—Wherefore the said plaintiff saith, that he is injured and hath sustained damage to the amount of fifty pounds, and therefore he brings his suit, etc.

## DEBT

## Writ

The King to the Sheriff of Middlesex, Greeting:

Command D, that justly and without delay he render to P the sum of one hundred pounds of good and lawful money, which he owes to and unjustly detains from him, as he says. And unless he shall do so, and if the said P shall make you secure of prosecuting his claim, then summon, by good summoners the said D that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show why he hath not done it; and have you there the (names of the) summoners and this writ.

Witness, etc. ....

*Declaration on simple contract*

In the King's Bench.

Hilary Term in the fourth year  
of the reign of King .....

~Middlesex, to wit: D was summoned to answer P of a plea that he render to the said P the sum of one hundred pounds of good and lawful money, which he owes to and unjustly detains from him. And thereupon the said P, by A, his attorney, complains: For that whereas the said D heretofore, to wit, on the .... day of ....., in the year of our Lord ....., at M, in the County of Middlesex, was indebted to the said P in the sum of one hundred pounds of lawful money, for divers goods, wares and merchandise, by the said P before that time sold and delivered to the said D at his special instance and request, to be paid by the said D to the said P when he, the said D, should be thereto afterwards requested; whereby, and by reason of the said last mentioned sum of money, being and remaining wholly unpaid, an action hath accrued to the said

P to demand and have of and from the said D the said sum of one hundred pounds above demanded, yet the said D (although often requested) hath not as yet paid the said sum of one hundred pounds above demanded, or any part thereof, to the said P, but so to do hath hitherto wholly refused, and still refuses to the damage of said P of fifty pounds, and therefore he brings his suit.

*Declaration on a bond*

Same as above through the word "complains," then continue:

For that whereas the said D heretofore to wit, on the . . . day of . . . , in the year of our Lord . . . , at M, in the County of Middlesex, by his certain writing obligatory, sealed with his seal, and now shown to the court here (the date whereof is the day and year aforesaid), acknowledged himself to be held and firmly bound to the said P in the sum of one hundred pounds above demanded to be paid to the said P; yet the said D (although often requested) hath not as yet paid the said sum of one hundred pounds above demanded or any part thereof, to the said P, but so to do hath hitherto wholly refused, and still refuses, to the damage of the said P of fifty pounds; and therefore he brings his suit.

*Declaration on a record*

Same as declaration on simple contract through the word "complains": For that whereas the said P, heretofore, to wit, in the Hilary Term in the first year of the reign of our Lord the now King, in the court of our said Lord the King, before the King himself at Westminster in the County of Middlesex, by the consideration and judgment of the said court, recovered against the said D the said sum of one hundred pounds above demanded, which in and by the said court were then and there adjudged to the said P for his damages, which he had sustained as well by reason of the non-performance by the said D of certain promise and undertaking then lately made by the said D to the said P, as for his costs and charges, by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof, remaining in the said court of our said Lord the King, before the King himself more fully appears; which said judgment still remains in full force and effect, not reversed, satisfied, or otherwise vacated; and

the said P hath not obtained any execution or satisfaction of or upon the said judgment so recorded as aforesaid; whereby an action hath accrued to the said P to demand and have, of and from the said D the said sum of one hundred pounds above demanded; yet the said D (though often requested) hath not as yet paid the said sum of one hundred pounds above demanded or any part thereof to the said P, but so to do hath hitherto wholly refused, and still refuses, to the damage of the said P of fifty pounds, and therefore he brings his suit.

*Declaration on a statute*

Same as declaration on simple contract through the word "complains": For that the said D within three months next before the commencement of this suit, to wit, on the .... day of ..... in the year of our Lord ....., at M, in the County of Middlesex, was indebted to the said P in the sum of one hundred pounds of lawful money, by force of the Statute made and passed in the 9th year of the reign of our late Queen Anne, entitled "An act for the better preventing of excessive and deceitful gaming," being money then and there lost and paid by the said P to the said D, and by the said D then and there won of the said P, by playing with dice at a certain unlawful game, commonly called or known by the name of French hazard, at one sitting, contrary to the form of the Statute in such case made and provided, whereby and by force of the Statute, an action hath accrued to the said P, to demand and have of and from the said D the said sum of one hundred pounds above demanded; yet the said D (though often requested) hath not as yet paid the said sum of one hundred pounds above demanded or any part thereof to the said P, but so to do hath hitherto wholly refused, and still refuses to the damage of said P of fifty pounds, and therefore he brings his suit.

DETINUE

*Writ*

The King to the Sheriff of Middlesex, Greeting:

Command D that justly and without delay he render to P certain goods and chattels of the value of one hundred pounds of

lawful money, which he unjustly detains from him, as he says. And unless he shall do so, and if the said P shall make you secure of prosecuting his claim, then summon, by good summoners the said D that he be before us in eight days of St. Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there the (names of the) summoners and this writ.

Witness, etc. ....

### *Declaration*

In the King's Bench.

Hilary Term in the fourth year  
of the reign of King .....

Middlesex, to wit: D was summoned to answer P of a plea that he render to the said P certain goods and chattels of the value of one hundred pounds, of lawful money, which he unjustly detains from him. And thereupon the said P, by A, his attorney, complains: For that whereas the said P, heretofore, to wit, on the .... day of ....., in the year of our Lord ....., at M, in the County of Middlesex, delivered to the said D certain goods and chattels of the said P, to wit, seven milch cows, of great value, to wit, the value of one hundred pounds of lawful money, to be redelivered by the said D to the said P when he, the said D should be thereto afterwards requested; yet the said D although he was afterwards, to wit, on the .... day of ....., in the year aforesaid, in the County aforesaid, requested by the said P so to do, hath not as yet delivered the said goods and chattels, or any part thereof, to the said P, but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the said P, to wit, at M aforesaid, in the County aforesaid, to the damage of the said P of fifty pounds; and therefore he brings his suit, etc.

### COVENANT

#### *Writ*

The King to the Sheriff of Middlesex, Greeting:

Command D that justly and without delay he keep with P the covenant made by the said D with the said P according to



the force, form and effect of a certain indenture in that behalf made between them, as he says. And unless he shall do so, and if the said P shall make you secure of prosecuting his claim, then summon, by good summoners, the said D that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there (the names of) the summoners, and this writ.

Witness, etc. ....

### *Declaration*

In the King's Bench.

Hilary Term in the fourth year  
of the reign of King .....

Middlesex, to wit: D was summoned to answer P of a plea that he keep with him the covenant made by the said D with the said P according to the force, form and effect of a certain indenture in that behalf made between them. And thereupon the said P, by A, his attorney, complains: For that whereas, heretofore, to wit, on the .... day of ....., in the year of our Lord ....., at M, in the County of Middlesex, by a certain indenture then and there made between the said P of the one part and the said D of the other part (one part of which said indenture, sealed with the seal of the said D, the said P now brings here into Court, the date whereof is the day and year aforesaid), the said P for the consideration therein mentioned did demise, lease, let and to farm let unto the said D a certain messuage or tenement in the said indenture particularly specified, to hold the same with the appurtenances, to the said D, his executors, administrators and assigns, from the tenth day of May next ensuing the date of said indenture, for and during, and unto the full end and term of one year from thence, next ensuing, and fully to be complete and ended, at a certain rent payable by the said D to the said P as in the said indenture is mentioned. And the said D for himself, his executors, administrators and assigns did thereby covenant, promise and agree to and with the said P, his heirs and assigns (among other things) that he, the said D, his executors, administrators and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said messuage

or tenement in good and tenantable repair, order and condition; and the same messuage or tenement and every part thereof should and would leave in such good repair, order and condition at the end or other sooner determination of the said term, as by the indenture, reference thereunto being had, will, among other things, fully appear. By virtue of which said indenture the said D afterwards, to wit, on the tenth day of May, in the year aforesaid, entered into the said messuage or tenement, with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the said P hath always, from the time of the making of the said indenture hitherto, done, performed and fulfilled all things in the said indenture contained on his part to be performed and fulfilled, yet protesting that the said D hath not performed or fulfilled anything in the said indenture contained on his part and behalf to be performed and fulfilled, in fact, the said P saith that the said D did not, during the continuance of the said demise, support, uphold, maintain and keep the said messuage or tenement in good and tenantable repair, order and condition and leave the same in such repair, order and condition at the end of the said term; but for a long time, to wit, for the last six months of the said term did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay and out of repair, for want of necessary reparation and amendment; and the said D left the same, being so ruinous, in decay and out of repair as aforesaid, at the end of said term, contrary to the form and effect of the said covenant so made as aforesaid. And so the said P saith, that the said D (although often requested) hath not kept the said covenant so by him made as aforesaid, but hath broken the same; and to keep the same with the said P hath hitherto wholly refused and still refuses, to the damage of the said P of fifty pounds, and therefore he brings his suit.

## ACCOUNT

*Writ*

The King to the Sheriff of Middlesex, Greeting:

Command D that justly and without delay he render to P his reasonable account concerning the time in which he was his bailiff in T and the receiver of the monies of him, the said P,

as he says. And unless he shall do so and if the said P shall make you secure of prosecuting his claim, then summon him, by good summoners, that he be before our justices at Westminster (on such a day) to show wherefore he has not done so. And have there the (names of the) summoners and this writ.

Witness, etc. ....

### *Declaration*

In the Common Pleas.

Hilary Term in the ..... year  
of the reign of King .....

Middlesex to wit: D was summoned to answer P of a plea that he render to the said P a reasonable account of the time in which he was the bailiff of the said P in T and the receiver of the monies of him, the said P. And thereupon the said P, by A, his attorney, says that whereas the said D was for a long time, to wit, from the first day of May in the year of our Lord....., until the first day of December, in the year of our Lord ....., the bailiff of the said P, to wit, at T in the parish of M, in the County of Middlesex, and during that time had the care and administration of divers goods and merchandise of the said P, that is to say, twelve chests of coral beads, containing a large quantity, to wit, three thousand pounds weight of coral beads, of the said P, of great value, to wit, of the value of twelve thousand pounds of lawful money of Great Britain to be merchandized and made profit of for the said P, and to render a reasonable account of the same to the said P, when he, the said D, should be afterwards thereto required; yet the said D hath not rendered a reasonable account of the same to the said P but hath hitherto altogether refused and still doth refuse so to do, to the damage of said P of twelve thousand pounds of lawful money, and therefore he brings his suit, etc.

(Adapted from *Godfrey v. Saunders*, 3 Wils 73).

### TRESPASS

#### *Writ*

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put by gages and safe pledges D that he be before us in eight

days of Saint Hilary, wheresoever we shall then be in England, to show wherefore, with force and arms, \*he broke and entered the close of the said P, situate and being in the parish of M, in the County of Middlesex, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said P there growing, and being of great value,\* and other wrongs to the said P there did, to the damage of the said P and against our peace; and have you there the names of the pledges and this writ.

Witness, etc.

(If the trespass were to the person or to chattels, the portion of the writ between the asterisks would be varied accordingly.)

### *Declaration*

In the King's Bench.

Hilary Term in the ..... year  
of the reign of King .....

Middlesex, to wit: D was attached to answer P of a plea wherefore he, the said D, with force and arms at the parish of M, in the County of Middlesex, broke and entered the close of the said P, situate and being in the parish of M, in the County of Middlesex, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said P there growing, and being of great value; and other wrongs to the said P there did, to the damage of the said P, and against the peace of our Lord, the now King. And thereupon the said P, by A his attorney, complains: For that the said D, heretofore, to wit,\* on the .... day of ....., in the year of our Lord....., with force and arms, broke and entered the close of the said P, that is to say, a certain close called Blackacre, situate and being in the parish aforesaid, in the County aforesaid, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said P, then and there growing, and being of great value, to wit, of the value of one hundred pounds of lawful money, and other wrongs to the said P then and there did; against the peace of our said Lord, the King, and to the damage of the said P of one hundred pounds; and therefore he brings\*his suit, etc.

## TRESPASS ON THE CASE

## Writ

If P shall make you secure of prosecuting his claim then put by gages and safe pledges D that he be before us in eight days of St. Hilary, wheresoever we shall then be in England to show wherefore (here insert the words included between the asterisks in the declaration below), as it is said. And have there the (names of the) summoners and this writ.

Witness, etc. ....

*On the King's Bench*      *Sec. Clerk's*  
Declaration

In the King's Bench.

Hilary Term in the ..... year  
of the reign of King .....

Middlesex, to wit: P, the plaintiff in the suit complains of D, the defendant in the suit, being in the custody of the Marshal of the Marshalsea of our lord, the now King, before the King himself, of a plea of trespass on the case. \* For that whereas the said defendant before and on the ..... day of ....., in the year of our Lord ....., was the possessor and occupier of a certain messuage and premises with the appurtenances, situate in the County of Middlesex, and near to a certain common and public highway there, in which said highway there now is, and before and on the same day and year aforesaid, there was, a certain hole, opening into a certain cellar and vault, of and belonging to the said messuage and premises of the said defendant, to wit, at the parish of T, in the said County of Middlesex. Yet the said defendant, well knowing the premises, whilst he was so the possessor and occupier of the said messuage and premises, with the appurtenances, and whilst there was such hole as aforesaid, to wit, on the day and year aforesaid, at said T in the said County of Middlesex, wrongfully and unjustly permitted the said hole to be and continue, and the same was then and there so badly, insufficiently and defectively covered, that by means of the premises, and for want of a proper and sufficient covering to the said hole, the said plaintiff, who was then and there passing in and along the said highway, then and there necessarily and unavoidably slipt and fell into the said hole, and thereby the left leg of the said plaintiff was then and there fractured and

broken, and he the said plaintiff became and was sick, sore, lame, diseased, and disordered, and so remained and continued, for a long space of time, to wit, from thence hitherto, during all which time, he, the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted, and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend a large sum, to wit, the sum of fifty pounds in and about the endeavoring to get healed and cured of the said wounds, sickness, and disorder, to wit at the said T in the said County of Middlesex, to the damage of the said plaintiff of five thousand pounds,\* and therefore he brings his suit, etc.

N. B. Note the commencement of the declaration. This was the proper form where the action was begun by Bill of Middlesex. If it was begun by original writ, the form for which is printed preceding the declaration, the commencement was as in the form of declaration in trespass.

## TRESPASS ON THE CASE FOR PROMISES

### *Writ in Special Assumpsit*

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put D by gages and safe pledges that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England to show cause wherefore (here insert that portion of the Declaration below, which is included between asterisks) as it is said. And have there the names of the pledges and this writ. •

Witness, etc.

N. B.: The above is the form of the writ used in the later common law practice. In the earlier practice the description of the complaint to which defendant must answer was much more general. For example, a sample writ given by Fitzherbert, having the same beginning, and ending as above, has substantially the following between the asterisks. "Whereas he, the said D undertook to make and build three carts for carrying of the victuals and harness of him the said P to parts beyond sea, for a certain sum of money, one part whereof he hath beforehand received, within a certain term between them agreed; he, the

same D hath not taken care to make and build the carts aforesaid within the term aforesaid, by which he the said P hath wholly lost divers his goods and chattels, to the value of one hundred marks, which ought to have been carried in the carts aforesaid, for the want of the carts aforesaid, to the great damage of him the said P."

*Declaration in Special Assumpsit*

In the King's Bench.

Hilary Term in the ..... year  
of the reign of King .....

Middlesex, towit: D was attached to answer P of a plea of trespass on the case upon promises and thereupon the said P, by A, his attorney, complains: For that \* whereas before the making of the promise and undertaking of the said D hereinafter next mentioned, certain differences had arisen and were then depending between the said P and the said D, touching and concerning certain books before then sold by the said D as the agent of and for the said P, to wit, at &c. (venue). And thereupon for the putting an end to the said differences, the said P and the said D, heretofore, to wit, on, &c. (date of submission or about it) at, &c. (venue) respectively submitted themselves to the award of one E. F. to be made between them, of and concerning the said differences; and in consideration thereof, and that the said P, at the special instance and request of the said D had then and there undertaken and faithfully promised the said defendant to perform and fulfill the award of the said E. F. to be so made between the said P and D, of and concerning the said differences in all things therein contained, on the said P's part and behalf, to be performed and fulfilled, he the said D undertook, and then and there faithfully promised the said P to perform and fulfill the said award in all things therein contained, on the said D's part and behalf, to be performed and fulfilled. And the said P in fact saith, that the said E. F. having taken upon himself the burthen of the said arbitrament, afterwards, to wit, on, &c. (date of award or about it) at, &c. (venue) aforesaid, made his certain award between the said P and the said D, of, and concerning the said differences, and did thereby award 100 pounds to be paid by the said D to the said P, in full satisfaction and discharge of the said matters in difference. Of which said award the said D afterwards, to wit, on the day and year last aforesaid, at

&c. (venue) aforesaid, had notice. And although he, the said D, afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, was requested by the said P to pay him the said sum of 100 pounds, according to the tenor and effect of the said award, and his said promise and undertaking; yet the said D not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said P in this behalf, did not, nor would, on the day and year last aforesaid, or when he was so requested as aforesaid, or at any time afterwards, pay the said sum of 100 pounds, or any part thereof, to the said P, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. (venue) aforesaid, to the damage of said P in the sum of one hundred fifty pounds,\* and therefore he brings his suit.

N. B.: In the older form of declaration after the statement that D was attached to answer P of a plea of trespass on the case upon promises, there was inserted from the writ, that portion beginning "wherefore" and concluding with the word preceding the words "as it is said." See, for example the writ and declaration in Trespass, printed above.

### *Writ in General Assumpsit*

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put by gages and safe pledges D, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore, whereas the said D heretofore, to wit, on the ..... day of ....., in the year of our Lord ....., at M, in the county of Middlesex, was indebted to the said A. B. in the sum of one hundred pounds, of lawful money of Great Britain, for divers goods, wares and merchandises by the said P before that time sold and delivered to the said P at his special instance and request; and being so indebted, he, the said D, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at M aforesaid, in the county aforesaid, undertook and faithfully promised the said P to pay him the said sum of money when he, the said D, should be thereto afterwards requested; yet the said D, not regarding his said promise and undertaking, but contriving, and fraudulently intending, craftily and subtly, to deceive and defraud the said P in this behalf, hath not yet paid the sum



of money, or any part thereof, to the said P (although oftentimes afterwards requested). But the said D to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said P of one hundred pounds, as it is said; and have you there the names of the pledges and this writ.

Witness,

*Declaration in General Assumpsit*

*For Goods Sold and Delivered*

In the King's Bench.

Hilary Term in the ..... year  
of the reign of King .....

Middlesex, to wit, D was attached to answer P of a plea of trespass on the case; and thereupon the said P, by A, his attorney, complains: For that whereas the said D heretofore, to wit, on the ..... day of ....., in the year of our Lord ....., at M, in the county of Middlesex, was indebted to the said P in the sum of one hundred pounds, of lawful money of Great Britain, for divers goods, wares and merchandises by the said P before that time sold and delivered to the said D at his special instance and request; and being so indebted, he, the said D, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at M aforesaid, in the county aforesaid, undertook and faithfully promised the said P to pay him the said sum of money when he, the said D should be thereto afterwards requested. Yet the said D, not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said P in this behalf, hath not yet paid the said sum of money, or any part thereof, to the said P (although oftentimes requested). But the said D, to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said P of one hundred pounds; and therefore he brings this suit, etc.

TRESPASS ON THE CASE

*Writ in Trover*

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put D by gages and safe pledges that he be before us in eight days of St. Hilary wheresoever we shall then be in England to show

wherefore (here insert that portion of the Declaration below, which is included between asterisks) as it is said. And have there the names of the pledges and this writ.

Witness, etc.

### *Declaration*

In the King's Bench.

Hilary Term in the ..... year  
of the reign of King .....

Middlesex, to wit: D was attached to answer P of a plea of trespass on the case, and thereupon the said P by A, his attorney, complains for that \*whereas the said P, heretofore, to wit, on, etc., at, etc. (venue), was lawfully possessed, as of his own property of certain goods and chattels, to wit, five black horses of great value, to wit, of the value of fifty pounds, of lawful money of Great Britain. And being so possessed, the said P afterwards, to wit, on the day and year first above mentioned, at, etc. (venue), aforesaid, casually lost the said goods and chattels, out of his possession; and the same afterwards, to wit, on the day and year first aforesaid, at, etc. (venue), aforesaid came to the possession of the said D by finding. Yet the said D well knowing the said goods and chattels, to be the property of the said P, and of right to belong and appertain to him, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said P in this behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said P, although often requested so to do; and afterward, to wit, on the day and year last aforesaid, at, etc. (venue), aforesaid, converted and disposed of the said goods and chattels, to his own use. Wherefore the said P saith that he is injured, and hath sustained damage to the amount of fifty pounds,\* and therefore he brings his suit, etc.

### EJECTMENT

#### *Writ*

The King to the Sheriff of Middlesex, Greeting:

If P (John Doe) shall make you secure of prosecuting his claim, then put D, (Richard Roe), by gages and safe pledges that he be before us in eight days of Saint Hilary to show wherefore with force and arms he entered into the manor of M which

A demised to the said P (John Doe) for a term which is not yet passed, and the goods and chattels of him the said P (John Doe) to the value of one hundred pounds of lawful money took and carried away and ejected him the said P, (John Doe), from his farm aforesaid and other wrongs to him did to the great damage of him the said P (John Doe).

Witness, etc.

### *Declaration*

In the King's Bench (or "Common Pleas").

..... Term, ..... Will. 4.

Middlesex, to wit. Richard Roe was attached to answer John Doe of a plea, wherefore he, the said Richard Roe, with force and arms, &c. entered into the manor of M with the appurtenances, situate and being in the parish of M aforesaid, in the county of Middlesex aforesaid, with the common of pasture thereunto belonging and appertaining which A had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c.—And thereupon the said John Doe, by E. F. his attorney, complains, that whereas the said A on the ..... day of ....., in the ..... year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe, and his assigns, from thenceforth, (or from the ..... day of ....., in the ..... year aforesaid) for and during, and unto the full end and term of ....., from thence next ensuing, and fully to be completed and ended. By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term, so to him thereby granted, as aforesaid. And the said John Doe, being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid (or, on the ..... day of ....., in the year aforesaid), with force and arms, &c. entered into the tenements with the appurtenances, in which the said John Doe was so interested, in manner, and for the term aforesaid, which is not yet expired and ejected him the said John Doe out of his said

farm, and other wrongs to the said John Doe did, to the great damage of him the said John Doe, and against the peace of our said lord the king; whereof the said John Doe saith that he is injured, and hath sustained damage to the value of 50 pounds, and therefore he brings his suit, &c.

Mr. C. D. (the tenant or tenants in actual possession).

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I, being sued in this action as casual ejector only, and having no claim or title to the same, do advise you to appear in next ..... Term, (or, if the premises lie in London or Middlesex, "on the first day of next ..... Term,") in his majesty's Court of King's Bench, wheresoever, &c. (or, in the Common Pleas, "in his Majesty's Court of Common Bench at Westminster") by some attorney of that court, and then and there, by rule of the same court to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this ..... day of ....., A. D. ....

Yours, &c.

Richard Roe.



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